82-344

No.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

UNITED OIL MANUFACTURING CO., INC.
Petitioner

v.

NATIONAL LABOR RELATIONS BOARD
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTION PRESENTED

Was the unlawful conduct of the Petitioner sufficiently pervasive and irremediable by traditional means to warrant imposition of the extraordinary bargaining order remedy?

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II. OPINIONS BELOW

The opinion of the United States Court of Appeals for the Third Circuit is officially reported at 672 F. 2d 1208 (3rd Cir., 1982) and is reproduced in slip-opinion form as Appendix A to this Petition.

The opinion of the United States Court of appeals for the Third Circuit en banc denying the petition for rehearing, is not yet officially reported, and is reproduced as Appendix C to this Petition.

III. STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Third Circuit was issued on April 19, 1982 (App. B). The denial of the petition for rehearing before the United States Court of Appeals for the Third Circuit en banc was issued on May 17, 1982. This Court has jurisdiction pursuant to 28 U.S.C. § 1254 (1).

IV. STATUTES INVOLVED

Section 29 U.S.C. § 157 provides as follows:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158 (a) (3) of this title.

Section 29 U.S.C. § 158 (a) provides in part:

> (a) It shall be an unfair labor practice for an employer -
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;
>
> * * *
>
> (3) By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: . . .
>
> * * *
>
> (5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159 (a) of this title.

V. STATEMENT OF THE CASE

On December 7, 1979, the Amalgamated Food Employees Union, Local 590 ("Union") filed a charge of Unfair Practices against the United Oil Manufacturing Co., Inc. (Petitioner"),[1] alleging that the Petitioner had committed unfair labor practices in violation of Sections 8 (a) (1) and (3) of the National Labor Relations Act, as amended, 29 U.S.C. §158 (a) (1) and (3) ("Act").

On February 8, 1980, a second charge was filed by the Union alleging violations of Sections 8 (a) (1) and (5) of the Act, 29 U.S.C. §158 (a) (1) and (5). On September 5, 1980, the Administrative Law Judge ("ALJ") issued his decision and recommended Order, finding that the Petitioner committed certain violations of Sections 8 (a) (1) and (3) of the Act, but finding that the Petitioner did not commit any violation of Section 8 (a) (5) and dismissing certain other alleged violations of Sections 8 (a) (1) and (3).

The General Counsel of the Board filed exceptions and the Petitioner submitted cross-exceptions to the ALJ's decision and on March 10, 1981, the Board issued a Decision and Order which impliedly denied the Petitioner's cross-exceptions and sustained the General Counsel's exceptions in part. The Board, contrary to the recommendation of the ALJ, imposed a bargaining order upon the Petitioner under the authority of *NLRB v. Gissel Packing Co., Inc.*, 395 U.S. 575, 89 S. Ct. 1918 (1969).

The Petitioner appealed to the Court of Appeals for the Third Circuit which on April 29, 1982, denied the Petitioner's petition for review and granted the Board's cross-application for enforcement of the bargaining order.

The Petitioner then filed a petition for rehearing *en banc* which was denied on May 17, 1982.

The Petitioner now seeks a Writ of Certiorari to review the question raised by the Third Circuit's enforcement of the bargaining order in the instant case.

1. United Oil Manufacturing Co., Inc. is a wholly owned subsidiary of United Refining Co., Inc. of Warren, Pennsylvania. United Refining Co., Inc. is a wholly owned subsidiary of Coral Petroleum, Inc. of Houston, Texas.

VI. ARGUMENT IN SUPPORT OF THE ISSUANCE OF THE WRIT OF CERTIORARI

In *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 89 S. Ct. 1918, 23 L.Ed. 2d 547 (1969), the Supreme Court established minimum standards to be met before compelling employers to bargain with unions that had not been selected through N.L.R.B. conducted representation elections. The Court emphasized that elections, not bargaining orders, are the preferred method of assuring employees' free choice of a bargaining representative, 395 U.S. 602, 89 S. Ct. 1934, and bargaining orders should not be issued unless the possibility of ensuring a fair election is slight. 395 U.S. at 614, 89 S. Ct. at 1940. Since that time, the N.L.R.B. and the Circuit Courts have refined, redefined, and, not infrequently, misapplied the *Gissel* standards producing a plethora of inconsistent and disparate decisions.

It is axiomatic that the propriety of a bargaining order is a factual conclusion in every case. No automatic formula can be devised for mechanical application in every case to suggest that, for example, two threats, one coercive interrogation, and the grant of benefits will result in an order while some other combination will not. The N.L.R.B. has been criticized from time to time for its simplistic and mechanical application of general rules in a manner that impairs the employees' free choice in a democratic forum. See *NLRB v. Jamaica Towing, Inc.*, 632 F. 2d 208 (2nd Cir., 1980) and *NLRB v. Appletree Chevrolet, Inc.*, 608 F. 2d 988 (4th Cir., 1979).

The N.L.R.B.'s disregard of *Gissel* restrictions and imposition of bargaining orders when relatively insignificant and almost incidental unfair labor practices occur during an organization campaign, produces frequently inconsistent results in the Circuit Courts, depending more upon the specific court involved and the particular composition of its panel than on the real teachings of *Gissel*. The various Circuit Courts have struggled frequently with difficult issues raised by the Board's demonstrated propensity to treat the issuance of a bargaining order as a routine and

ordinary event rather than as an unusual and extraordinary remedy. See *Red Oaks Nursing Home, Inc. v. NLRB*, 633 F. 2d 503 (7th Cir., 1980); and *NLRB v. Western Drug*, 600 F. 2d 1324 (9th Cir., 1979).

Perhaps the best evidence of this struggle is the battered history of *Gissel* in the Third Circuit. Many split panel decisions have led to a proliferation of *en banc* hearings with inevitably mixed results. See generally, *NLRB v. Permanent Label Corp.*, 657 F. 2d 512 (3rd Cir., 1981), cert. denied _____ U.S. _____, 102 S. Ct. 1432, _____ L. Ed. 2d _____ (1982); *Hedstrom Co. v. NLRB*, 629 F. 2d 305 (3rd Cir., 1980) (Hedstrom II), cert. denied, 450 U.S. 996, 101 S. Ct. 1699, 68 L. Ed. 2d 196 (1981); *NLRB v. Armcor Industries, Inc.*, 588 F. 2d 821 (3rd Cir., 1978) (Armcor II) (unreported per curiam); and *NLRB v. K & K Gourmet Meats, Inc.*, 640 F.2d 460 (3rd Cir., 1981); *NLRB v. Garry Mfg. Co.*, 630 F.2d 934 (3rd Cir., 1980); *Electric Products Division of Midland Ross Corp. v. NLRB*, 617 F.2d 977 (3rd Cir., 1980), cert. denied, 449 U.S. 871, 101 S. Ct. 210, 66 L. Ed. 2d 91 (1980); and *Rapid Mfg. Co. v. NLRB*, 612 F.2d 144 (3rd Cir., 1979).

The *Gissel* decision, which was intended to add predictability and stability to an important area of labor law, has utterly failed to achieve its goal in this Circuit.

Indeed, the panels routinely give lip-service to the *Gissel* standards, and proceed to manipulate the standards primarily to achieve the results a given panel majority desires. Judge Gibbons noted recently that it is "no secret" that a significant number of judges on this court have been signalling the Board that *Gissel* bargaining orders "are unwelcome in this circuit" while another group of judges are giving quite a different signal. *NLRB v. K & K Gourmet Meats, Inc.*, 640 F.2d at 470-471 (dissenting opinion)

The desperate need for further elucidation of the *Gissel* standards is made obvious by the present case, particularly when it is viewed in comparison to the decision of a different panel of the same court in *NLRB v. K & K Gourmet Meats, Inc.*, 640 F.2d 460 (3rd Cir., 1981). The two cases, decided approximately one year apart, reach opposite conclusions on facts which are strikingly similar. In both cases, the violations were minimal and rather clearly subject to remedy by traditional methods, leaving selection of a representative also for traditional treatment in a democratic election process. The Court did just that in *K & K* but reached a diametrically opposite result in the instant case behind the pretext of "factual differences" in the cases. Analysis of the cases by any fair-minded observer should establish clearly that, to the extent any differences can be found in the cases, the unfair labor practices in *K & K* were more pervasive and more difficult to remedy than those in the present case.

In neither case, however, is a bargaining order appropriate and the inconsistency in these results emphatically underscores the need to fashion some further definition of the *Gissel* standard and to define the end point beyond which establishment of bargaining order remedies does violence to the very policy underlying the *Gissel* decision. It is respectfully submitted that this case is beyond that limit and presents to the Court a unique opportunity to define minimum standards.

A comparative evaluation of the two cases serves to emphasize this need not only from the standpoint of defining minimum standards to assure reasonably consistent results but also, and perhaps more importantly, because it demonstrates a pattern of conduct on the part of this union which perverts the *Gissel* objectives. Unfortunately, that pattern is not the exclusive province of this Union and is no longer uncommon.

Some attention must be given the procedural development of the two cases involving the same union and the same union organizer in order to understand what is occurring. One inevitably

concludes that, as a matter of organizing tactics, this union *specifically prefers not* to use the judicially favored, conventional, Board conducted election to secure representation rights. Rather, they prefer to engage in recognitional strikes which, if successful, are followed by a subsequent claim that the fair election which has been carefully avoided is "impossible." This pattern of conduct is predicated upon the assumption that the N.L.R.B. will continue to treat bargaining orders as routine rather than extraordinary remedies and that the Courts will routinely enforce them much of the time. The absence of a well-defined minimum standard perpetuates such an assumption. The union achieved its end in this case even though it had not done so with indistinguishable facts in *K & K*.

Specific comparison of the facts will be instructive. As has been stated, both cases involve the same union, the same organizer and very small proposed bargaining units. The alleged violations of Section 8 (a) (1) of the Act (29 U.S.C.A. § 158 (a) (1)) are much the same. In *K & K* promises of substantial benefit improvements were made by the owner of the Company to all fourteen employees. In the instant case, less than one-fourth of the 29 member bargaining unit was affected by a wage increase of literally a few cents per hour, and one employee was "interrogated" *after* he had volunteered information.

Both cases involved fully effective strike activity *after* this allegedly coercive conduct. In both cases, the Union avoided an election. In both cases, the ALJ denied a bargaining order concluding that traditional remedies would suffice to ensure a fair election. Finally, in both cases, the Board rejected this conclusion of the ALJ and entered a bargaining order.

In the Opinion of the Court below, Judge Sloviter dismissed the striking similarities between the cases with barely a mention and concentrated instead on what were termed "significant differences" between the cases. Based on these significant differences, Judge Sloviter rejected *K & K* as controlling precedent and refused to follow the course that the same court had charted

in that decision where the Board's bargaining order was denied enforcement. However, when the "significant differences" are analyzed separately, it becomes evident that they are not only not significant but, for the most part, are not even differences.

The first "significant difference", the ALJ's characterization of the unfair labor practices in *K & K Gourmet Meats* as "minimal" as opposed to the instant case wherein the ALJ characterized the violations as "serious unfair labor practices," clearly is irrelevant to the propriety of a bargaining order. Imposition of a bargaining order does not hinge upon the characterization of the unfair labor practices involved. Rather, bargaining orders are imposed only where the improper conduct is sufficiently egregious to render traditional remedies impotent, or as the Court stated, "*only* in exceptional circumstances, where it is *obvious* that the extensive machinery and power of the NLRB is inadequate to ensure a free election . . ." "*K & K Gourmet Meats, Inc.*, 640 F.2d at 469 (Emphasis added.)

In the instant action, it certainly is not obvious that a free election could not be had. In the eyes of the ALJ who "observed the live testimony of the employee witnesses and [made] a first hand evaluation of the workplace atmosphere" (Slip Op. p. 22), such a course was not only possible, but appropriate.

Judge Van Dusen quite aptly stated in his dissenting opinion (Slip Op. p. 22):

> . . . whatever the ALJ may have meant by the term "serious" he clearly did not mean "sufficient to warrant a bargaining order." To then use the ALJ's subjective language to support a conclusion he himself refused to reach seems to me to be rather anomalous.

The second "significant difference," that in *K & K Gourmet Meats* only two of five unfair labor practices were supported by the record, while the Petitioner in the instant action conceded three of five alleged violations, is also irrelevant. Again, it is

neither the severity nor the number of violations alone that dictates whether a bargaining order should be imposed. Nor is the position of the employer in contesting or not contesting the allegations relevant. Rather, the determining factor must be whether there is a likelihood of a fair election being conducted after the unfair labor practices have been remedied in a traditional fashion. The unfair labor practices found to have been committed by the Petitioner in the instant action would do no more, and probably less, to damage the possibilities of a fair election than would the violations which occurred in *K & K Gourmet Meats.*

In *K & K Gourmet Meats,* the employer made repeated promises to every employee of increased wages, improved insurance benefits, new pension and profit sharing arrangements and other general improvements. The promises were made to all employees and the benefits would affect all employees. The Court concluded that this conduct was subject to adequate remedy through traditional methods. In the present case, the employer interrogated one employee in a relatively innocuous manner not significantly different from the interrogation which was deemed non-coercive and thus not unlawful in *K & K Gourmet Meats,* and the employer here increased the wages of only six out of twenty-nine employees.

In *K & K Gourmet Meats* the Court concluded that the unfair labor practices engaged in by the employer had little if any effect on the employees or the union's majority status as evidenced by the successful strike called after the violations were committed. In the present case, two of the three unfair labor practices occurred prior to a similarly successful strike initiated by the Union. It is, therefore, obvious that the pre-strike activities of petitioner in the instant case, were not sufficient to undermine the strength of the Union and, thus, in accordance with *K & K Gourmet Meats,* no bargaining order should be imposed on the basis of the pre-strike activity of the Petitioner. Describing the conduct which the employer here has not contested as "admitted"

cannot make it more serious than that which was "contested" but found to be a violation in *K & K*.

The only point of distinction in fact between this case and *K & K Gourment Meats* is the third "significant difference" noted by Judge Sloviter, namely, that the present case, unlike *K & K Gourmet Meats*, involves a post-strike violation. Petitioner has not contested the technical violation found in its failure to restore three strikers to overtime benefits previously enjoyed. This distinction is clearly not even relevant insofar as the bargaining order issue is concerned. The ALJ decision makes it quite apparent that the post-strike violation was a virtually inadvertent technical violation which resulted essentially because some strike replacements continued working after the strike. By no stretch of the imagination could this violation, in and of itself, distinguish the present case from *K & K Gourment Meats* for purposes of a bargaining order. Yet, the strong emphasis Judge Sloviter's opinion places on this particular violation makes clear that this is the sole distinction supportive of the bargaining order here.

Judge Sloviter opined that the post-strike violation "clearly demonstrat [ed] to the employees that [United Oil] alone controlled their economic destiny." (Slip Op. p. 11) This conclusion is totally lacking in merit and logic. Any effect the post-strike violation may have had on the employees' idea of who controlled their "economic destiny" would have been completely abrogated by the ALJ's order directing Petitioner to reinstate the employees' overtime. If Petitioner had indeed intended to demonstrate its power over its employees by failing to reinstate the overtime of three employees, that intention could have been thwarted by traditional remedies. By ordering Petitioner to reinstate the employees' overtime, the ALJ could adequately demonstrate to Petitioner's employees that the employer could not control their "economic destiny." Such a remedy would demonstrate quite graphically to the employees that the NLRB, acting on the union's charge, controlled the employer's actions in a very

effective fashion. It must be borne in mind that an election would not be conducted, by NLRB rules, until the employer had posted the required notices and complied with their terms throughout the sixty day posting period. Certainly, the imposition of a bargaining order was neither necessary nor proper in those circumstances.

In sum, the differences between the two cases are so slight and superficial that the cases demand similar treatment and like results. Both are far beyond the scope and intent of *Gissel*, yet a bargaining order issued in the instant case. The *only real difference* is the panel which decided the cases. Such a result is only possible because no clear minimum standard for *Gissel II* type orders has been defined by this Court. A sufficient number of cases have now been decided that the Court can and must extract and define certain more specific criteria for determining the propriety of a bargaining order.

The utter confusion which results from cases such as these is not isolated to the Third Circuit. The same confusion, lack of uniformity and lack of predictability can be found everywhere.

Indeed, by comparison to the present case, a whole host of cases in other Circuits have denied bargaining orders in cases where far more flagrant violations, including discharges and threats of plant closure, have been present. Such violations are far more difficult to remedy by traditional means than the minor conduct involved in the present case. Yet, a sampling from various Circuits makes clear that bargaining orders are frequently found inappropriate in those cases. *See generally, NLRB v. Pace Oldsmobile, Inc.*, 94 LC 13,596, (2nd Cir., May 23, 1982) (21 employees in unit; discharge of pro-union employee; promise of benefits, threats of plant closure, coercive interrogation, and refusal to reinstate three strikers and the discharged employee; propriety of bargaining order not obvious from the facts); *NLRB v. Chatfield-Anderson Co., Inc.*, 606 F.2d 266 (9thCir., 1979) (34 employees in unit; coercive interrogation, threat of economic reprisals, threat of stricter work rules, threat of withholding

contemplated raises and bonuses, promise of economic benefits, creation of open door policy, and threat to prolong negotiations while withholding raises and bonuses; conduct hardly irreparable requiring a bargaining order); *NLRB v. Pilgrim Foods, Inc.*, 591 F.2d 110 (1st Cir., 1978) (8 employees in unit; surveillance, soliciting grievances, promising benefits, threatening reprisals, withholding pay increase to pro-union employee and discharge of pro-union employee; record indicates violations fall within *Gissel III* category, therefore no bargaining order); and *Peerless of America, Inc. v. NLRB*, 484 F.2d 1108 (7th Cir., 1973) (39 employees in unit; polled employees, repeated interrogation, repeated efforts to have an employee persuade others to defeat union, promise of better benefits, promise of better working conditions, threat of worsened conditions if union wins, and threat of plant closure and/or layoff).

These decisions fairly sample some more egregious conduct deemed insufficient to warrant a bargaining order and highlight the dubious precedential value of the *Gissel* case and its progeny at the Circuit Court level. The checkered pattern of these cases emanates from a lack of guidance by this Court regarding the minimum standard warranting issuance of a bargaining order.

As Judge Van Dusen noted in his dissenting remarks, "While it is fundamental to our common law system that existing precedents be extended to new or different factual situations, there comes a point where to go further is to do violence to the very policy underlying the early decision." (Slip Op. p.24) The patent lack of factual similarity between the present case and *Gissel* and the inherent danger to employee free choice from this decision, demand that the Court draw the line here and effectively place a "bottom" on *Gissel* bargaining orders.

Judge Van Dusen's further observation that the *Gissel* court "never intended its extraordinary remedy to be expanded to the point where it becomes an equally attractive – or, in some cases, more attractive – alternative to a Board election," (Slip Op. p. 24) could not be more poignant.

One cannot read the record in the two cases and remain unconvinced that this union as a matter of policy deliberately avoids the election procedures and seeks to establish its representation status by force. It elicits some relatively minor employer response to its organizational activity, engages in a recognitional strike, claims a fair election is impossible and seeks a bargaining order based on whatever the employer might do, intentionally or inadvertently, in the interim. Such is not the purpose of the *Gissel* doctrine and such should not be its result.

Yet, the bargaining order in this case is a tacit condonation of this calculated avoidance of an election.

In the present case, the Union was rather overt in its callous disregard of employee rights to participate in a Board conducted election. *After* the Board rejected the Union's unit contention and directed an election in a conventional unit, the Union promptly withdrew its petition and filed unfair labor practice charges claiming that the fair election it sought up to that day was impossible because of conduct which had occurred months earlier. The Court simply cannot countenance and tacitly legitimize such a campaign tactic. The bargaining order in this case must be vacated and minimum standards must be defined which realistically confirm that a bargaining order is an extraordinary remedy, not merely a convenient alternative.

VII. CONCLUSION

For the reasons set forth above, the Court should issue a Writ of Certiorari to the United States Court of Appeals for the Third Circuit to correct a manifest error in its ruling on the question presented.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 81-1478

UNITED OIL MANUFACTURING CO., INC.,
Petitioner

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent

ON PETITION FOR REVIEW AND CROSS-APPLICATION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

NLRB Nos. 6-CA-12975 and 6-CA-13136

Argued Tuesday, October 27, 1981

Before: ADAMS, VAN DUSEN and SLOVITER,
Circuit Judges

(Opinion filed February 22, 1982)

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OPINION OF THE COURT

SLOVITER, *Circuit Judge.*

This case is before us on the petition of United Oil Manufacturing Co. (United Oil) for review of an order of the National Labor Relations Board (Board) directing it to cease and desist from the commission of certain unfair labor practices, restore past pay and benefits to certain employees, and recognize and bargain with the Union, and on the cross-application of the Board for enforcement of its order. United Oil challenges that portion of the order establishing a bargaining order remedy. For the reasons discussed below, we will deny the petition for review and grant the Board's cross-application for enforcement of its order.

I.

United Oil operates a vehicle service complex on Interstate 80 in Kylertown, Pennsylvania, known as "Stop 21", consisting of a gasoline and diesel fuel station, a store, and a motel. In the same complex, but operated by

independent lessees of United Oil's parent corporation, are a restaurant, barber shop, and truck repair facility.

In late October 1979, one of United Oil's employees, Julio Leid, contacted Amalgamated Food Employees Union Local 590, United Food and Commercial Workers International Union, AFL-CIO (Union), and arranged for an organizational meeting to be held at her home on the afternoon of October 28. Five employees attended the meeting with a union organizer and signed union authorization cards. By some time in early November, the Union had obtained signed authorization cards from 17 of the 29 employees in the unit. On November 3, November 5, and again on November 11, the Union sought recognition by the company. In response to the last of these requests, General Manager Cecil Felix declined to confer recognition and responded that he wanted a fair election. In the interval between the arrangements for the organizational meeting and the request for recognition, the company had engaged in conduct which formed the basis for some of the underlying unfair labor practice charges, including unlawful interrogation and the grant of wage increases and promotions for the purpose of discouraging union activity. The union representative told Felix that the company's conduct had made a fair election impossible, and convened a meeting of employees at which a decision to strike was adopted on account of the company's refusal to bargain and its alleged unfair labor practices in connection with the organizational campaign. The strike, which appears to have been completely effective, lasted from November 12, 1979 until March 10, 1980, when the employees were reinstated following their unconditional offer to return to work.

The Administrative Law Judge found that United Oil had committed three separate unfair labor practices. First, he found that the company, through General Manager Felix, had interrogated employee Eugene Zahuranec concerning the initial organizational meeting at Julio Leid's home on October 28 and had improp-

erly instructed him to report on what transpired at the meeting. Before the meeting, Zahuranec had requested Felix for time off to attend the meeting. Felix asked who else would be in attendance and "opined that the Union was no good." Felix "told Zahuranec to go to the meeting and to call him at the conclusion thereof to report what had happened." The next morning Felix phoned Zahuranec and asked who had been at the meeting, what had transpired, and the identity of the instigator of the union activity. Zahuranec identified the participants and indicated that he believed that Julio Leid had initially contacted the Union. Based on Zahuranec's testimony, which the ALJ credited, the ALJ found that United Oil violated section 8(a)(1) of the National Labor Relations Act by "Felix questioning [Zahuranec] concerning union activity of co-workers, by instructing Zahuranec to report on the union activity of co-workers, and by his broad questioning of Zahuranec as to what transpired at the union meeting of October 28."

The second unfair labor practice found by the ALJ was based on evidence that following its knowledge of the Union's organizational effort, the company granted promotions and small wage increases to five employees, including Julio Leid and one other employee who had attended the October 28 meeting. Leid was first contacted by Felix about the promotion on October 29; the official notification of all five promotions and wage increases came on November 3 in the form of an announcement signed by Felix which was included with employee paychecks. The ALJ noted that United Oil's "evidence includes no explanation for this sudden upgrading of the . . . employees and the grant of an increase, shortly after acquisition of knowledge that a union campaign was in progress." The ALJ found that United Oil violated section 8(a)(1) "by promising wage increases and promotions, and by granting same, for the purposes of discouraging union activity."

The third unfair labor practice related to the company's post-strike conduct. The ALJ credited the testimony of three reinstated strikers, including Leid and Zahuranec, that they were not accorded the same opportunity to earn overtime pay which they had enjoyed prior to the strike. The ALJ found that the failure to restore to the strikers the overtime benefits previously enjoyed was not justified by supervening economic considerations and, accordingly, violated sections 8(a)(3) and (1) of the Act.

Two additional unfair labor practice charges, involving alleged surveillance by Felix of the October 28 meeting and the discharge of an employee, were dismissed by the ALJ.

The ALJ ordered United Oil to cease and desist from the commission of the unfair labor practices found to have occurred, restore the overtime benefits enjoyed by the three employees prior to the strike, and post appropriate notices. The ALJ characterized the granting of the promotions and wage increases as "serious unfair labor practices." He acknowledged that whether a bargaining order was warranted was not "free from doubt," but rejected the request for a bargaining order on the ground that conventional remedies were adequate in this case to facilitate a fair election. Among the considerations referred to by the ALJ were that, with the exception of the denial of overtime benefits to the reinstated strikers, the company's unlawful conduct occurred prior to the first demand for recognition by the Union on November 3, and that the unlawful interrogation of Zahuranec occurred only after Zahuranec had initially volunteered information about the union activity of his fellow employees.

The Board adopted the ALJ's findings as to the commission of the unfair labor practices,[1] but modified the

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1. The Board found that the unlawful promotions and wage increases had been extended to a sixth employee.

ALJ's order insofar as it concerned the necessity of a bargaining order. The Board found that the company had violated section 8(a)(5) of the Act and that the unfair labor practices committed were sufficiently serious to warrant a bargaining order.

United Oil challenges only that portion of the Board's decision which found a section 8(a)(5) violation and issued a bargaining order remedy.

II.

As in all cases where a bargaining order is at issue, we start with the Supreme Court's decision in *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969). In our recent en banc opinion in *Hedstrom Co. v. NLRB*, 629 F.2d 305 (3d Cir. 1980), *cert. denied*, 450 U.S. 996 (1981), we summarized the teaching of *Gissel* as follows:

> In *Gissel*, the Court declared that a bargaining order may appropriately be imposed in place of a new election not only in cases involving outrageous conduct [so-called *Gissel* I cases], but also in other than extraordinary cases that are "marked by less pervasive practices which nonetheless still have the tendency to undermine majority strength and impede the election processes" [so-called *Gissel* II cases]. The Board's authority to issue a bargaining order on a lesser showing of employer misconduct is appropriate when there is also a showing that at one point the union had the support of a majority of employees. In such a case, a bargaining order serves both to effectuate ascertained employee free choice and to deter employer misconduct.

Id. at 308 (citations omitted).

Critics of bargaining orders stress the truism that free elections are the preferred method of selecting bargaining representatives, but the Supreme Court has approved the power of the Board to issue bargaining orders

in appropriate cases and we are obliged to defer to that judgment. In some situations, Board-ordered bargaining may be the only way in which employee choice can be effectuated. Although it may appear to us that the Board is sometimes too readily inclined to impose a bargaining order, which undesirably "insulates a union from the hazards of an election, and arguably tilts the scale too far in the union's favor," *NLRB v. K & K Gourmet Meats, Inc.*, 640 F.2d 460, 473 (3d Cir. 1981) (Gibbons, J., dissenting), the propriety of the choice of a bargaining order in a given case has been left to the Board. As the Court stated in *Gissel*:

> It is for the Board and not the courts . . . to make that determination, based on its expert estimate as to the effects on the election process of unfair labor practices of varying intensity. In fashioning its remedies under the broad provisions of §10(c) of the Act . . . the Board draws on a fund of knowledge and expertise all its own, and its choice of remedy must therefore be given special respect by reviewing courts. "[I]t is usually better to minimize the opportunity for reviewing courts to substitute their discretion for that of the agency."

395 U.S. at 612 n.32 (citations omitted). With the limited scope of our review thus in mind, we turn to an examination of the Board's choice of remedy in this case.

It does not seem to be disputed that this is a *Gissel* II-type case, or that the threshold requirement of a showing of union majority status has been satisfied. Nor does United Oil contest that it committed the 8(a)(1) and 8(a)(3) violations found by the Board. The crucial question before us is therefore whether the unfair labor practices which concededly occurred in this case were sufficient, in their extent and effect, to support the Board's choice of a bargaining order remedy.

The Board gave the following statement of the basis for its order:

The commission of such serious unfair labor practices enumerated above, in a unit as small as the unit involved herein, makes a fair election doubtful, if not impossible. By its actions, Respondent clearly demonstrated to the employees that it alone controlled their economic destiny. After ascertaining the identity of the principal union supporters, Respondent sought to "buy them off" with rewards and promotions. When that failed, Respondent took the reverse tack and punished them by denying overtime hours and pay. The message to the employees was that Respondent had the economic means at its disposal to achieve the result it desired. Such a powerful message cannot be erased or forgotten. Therefore, under these circumstances, the use of traditional remedies will not suffice. Accordingly, we conclude that a bargaining order would best protect employee sentiment already expressed through authorization cards.

United Oil's primary argument is that its unlawful conduct was minor and that there was no evidence that it tended to undermine the Union's majority. It emphasizes that the interrogation of Zahuranec and the grant of promotions and wage increases occurred prior to the Union's attainment of majority status, and that the targets of the unlawful conduct continued to support the Union even after its occurrence. This argument fails to respond to the significant finding that even after the strike, its unlawful post-strike conduct continued to send "a powerful message." The denial of overtime benefits occurred after both the attainment of union majority status and the manifestation of union support through the strike. The post-strike violations are important not only on their own account but also because of the reinforcing effect which they may have had on the pre-strike violations. In *NLRB v. Permanent Label Corp.*,

657 F.2d 512, 519 (3d Cir. 1981) (en banc), we rejected the contention that unfair labor practices which occur before the achievement of union majority could not be relied upon by the Board in issuing a bargaining order, since "[f]orbidding the Board from considering such conduct sets an artificial time barrier and ignores the possible cumulative effect of antiunion activity."

In *Electrical Products Division of Midland-Ross Corp. v. NLRB*, 617 F.2d 977 (3d Cir.), *cert. denied*, 449 U.S. 871 (1980), we identified the elements which we have often considered in determining whether a given bargaining order is proper. One was whether the objectionable conduct "was communicated to a 'significant percentage of employees in the bargaining unit.' " *Id.* at 987. In this case, seven out of the 29 employees in the unit were directly affected by the illegal conduct, either as the targets of interrogation, the recipients of promotions and wage increases, or the victims of denied overtime benefits. The wage increases and promotions were communicated in writing by the employer to other employees. A change in the union vote of only three employees would have destroyed the union's majority.

The second element referred to in *Midland-Ross* was whether "the unfair labor practices involved senior company officials." *Id.* Here, the central figure in the unlawful conduct charged to Union Oil was General Manager Felix, the most senior company official at Stop 21.

The final *Midland-Ross* factor was whether the unfair labor practices created "a psychological impact on all the employees that is unlikely to dissipate." *Id.* The unfair labor practices in this case may not have the same psychological impact as the threats of plant closure involved in *Midland-Ross*, but we cannot say that the Board overstepped the limits of the discretion vested in it by *Gissel* when it concluded that United Oil's conduct

conveyed "a powerful message [which] cannot be erased or forgotten."[2]

United Oil contends that our review in this case should be governed by the decision in *NLRB v. K & K Gourmet Meats, Inc.*, 640 F.2d 460 (3d Cir. 1981), where we refused to enforce a bargaining order. On the surface, there is some resemblance between the two cases. *K & K Gourmet Meats* involved the same union and union organizer, similar charges of unlawful interrogation and promises of benefits, and a strike during the organizational campaign. Moreover, in *K & K Gourmet Meats*, as in this case, the Board overruled the ALJ in imposing a bargaining order.

A careful examination shows significant differences between *K & K Gourmet Meats* and this case.[3] In *K & K Gourmet Meats*, the ALJ had characterized the violations of the Act as "minimal", 640 F.2d at 468; in this case the ALJ described the promotions and wage increases as "serious unfair labor practices." In *K & K Gourmet Meats*, we determined that only two of the five

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2. In Hedstrom Co. v. NLRB, 629 F.2d at 312, we listed a fourth factor, which does not seem to be present in this case: whether "the employer has demonstrated a history of opposition to unionization."

3. Similarly, the other cases cited by United Oil fail to support its position that the bargaining order here was improper. NLRB v. Armcor Industries, Inc., 535 F.2d 239 (3d Cir. 1976) and Hedstrom Co. v. NLRB, 558 F.2d 1137 (3d Cir. 1977), both turned not on the merits of the bargaining order but on the Board's failure to articulate the basis for its decision. Indeed, when the Board on remand in *Hedstrom* stated its reasons and again imposed a bargaining order, this court enforced the order. Hedstrom v. NLRB, 629 F.2d 305 (3d Cir. 1980) (en banc), *cert. denied*, 450 U.S. 996 (1981). In Struthers-Dunn, Inc. v. NLRB, 574 F.2d 796 (3d Cir. 1978), the record showed that the union had lost its majority before the commencement of any unfair labor practice. Finally, in Rapid Manufacturing Co. v. NLRB, 612 F.2d 144 (3d Cir. 1979), the evidence demonstrated that the unlawful conduct had neither involved senior company officials nor affected a significant percentage of the employees.

unfair labor practices upon which the Board had based its bargaining order were supported by the record; in this case the violations are conceded. The company relies on the statement in *K & K Gourmet Meats* where the court pointed to the strike which followed the commission of the unfair labor practices as providing an indication that the unlawful conduct had had little impact on union support. However, in that case there were no post-strike violations. Here, the company engaged in unfair labor practices after the strike and that conduct was directed at one of the leading union supporters, among others. The Board found that post-strike conduct contributed to the effect of "clearly demonstrat[ing] to the employees that [United Oil] alone controlled their economic destiny." Finally, if the holding in *K & K Gourmet Meats* suggested some hostility on the part of this court to bargaining orders, then any such impression should have been dispelled by our subsequent en banc decision in *NLRB v. Permanent Label Corp.*, 657 F.2d 512 (3d Cir. 1981), where a bargaining order was enforced.

The Supreme Court has recently reaffirmed that the judiciary should not substitute its judgment for that of the Board "with respect to the issues that Congress intended the Board should resolve." *Charles D. Bonanno Linen Service, Inc. v. NLRB*, 50 U.S.L.W. 4087, 4091 (U.S. Jan. 12, 1982). The binding precedent of *Gissel* teaches that the choice of remedy for unfair labor practices is an issue vested in the discretion of the Board. We do not suggest that the courts do not have an important review function to perform, but that we must be mindful of its proper scope. It is not relevant whether we would have reached the same conclusion as the Board; it is "not our function to substitute our judgment for the Board's on the propriety of a bargaining order." *NLRB v. Armcor Industries, Inc.*, 535 F.2d 239, 245 (3d Cir. 1976). In this case, we cannot conclude that the Board overstepped the authority of *Gissel* in reaching its conclusion that the cumulative effect of the unfair labor

practices made "the possibility of erasing the effects of past practices and of ensuring a fair election . . . by the use of traditional remedies, though present, . . . slight." *Gissel*, 395 U.S. at 614.[4]

III.

United Oil raises two additional arguments for denying enforcement. On December 7, 1979, the Union had filed a representation petition with the Board, seeking a unit which included all of United Oil's full-time and regular part-time employees at Stop 21, as well as the employees of the leased restaurant; or in the alternative, a unit which excluded all of the employees of the leased operations and in addition excluded the employees of the motel operated by United Oil. In a decision dated January 29, 1980, the Regional Director rejected both units proposed by the Union, and directed an election in a unit comprising all of United Oil's full-time and regular part-time employees at Stop 21, including the motel employees, and excluding the employees of the leased restaurant. United Oil contends that because the unit sought by the Union in its representation petition was found by the Regional Director to be inappropriate the Board erred in finding a section 8(a)(5) violation. However, the ALJ found that at the time United Oil rejected the Union's demand for recognition, it had no knowledge of the inappropriateness of the unit sought. The ALJ found that the Union's demand for recognition had described an appropriate unit consisting of "[a]ll full-time and part-time employees employed by United Oil Corporation at your Kylertown Truck Stop 21, Clearfield County[,] [e]xcluding: all other employees

4. The Board adopted all of the ALJ's relevant factual findings, and differed only as to the need for a bargaining order. Therefore, the case to which the dissent refers, Eastern Engineering and Elevator Co. v. NLRB, 637 F.2d 191 (3d Cir. 1980), in which the Board had overruled the ALJ's credibility determination, is inapposite.

and guards, professional employees and supervisors as defined in the Act." It is therefore immaterial that the subsequent representation petition described the unit differently.

The company's other argument is that the General Counsel's complaint alleged only that the Union enjoyed majority status from October 28, 1979 until November 3, 1979 (when the Union first demanded recognition), and that no allegation was made that the majority status continued until November 11, the date of the Union's final demand for recognition and its rejection by United Oil. However, the company does not contend that the Union did not maintain its majority through at least November 11; indeed it is the maintenance of that majority on which the company relied in challenging the need for a bargaining order. We find that the record in this case supports the Board's conclusion that the Union had majority status at the relevant times.

For the foregoing reasons, we will deny United Oil's petition for review, and enforce the order of the Board.

ADAMS, *Circuit Judge*, concurring.

In a number of important respects, I agree with the sentiments expressed in Judge Van Dusen's dissenting opinion. For example, I subscribe to the view that "a fundamental tenet of the national labor policy is that a Board-supervised, secret ballot election is 'the preferred method of selecting bargaining representatives.'" Dissenting opinion, typescript op. at 3. Similarly, I believe that a "bargaining order is an extraordinary remedy . . .

[and] is appropriate only when the harmful effects of [the] disenfranchisement [of workers] are outweighed by the positive advancement of the policies underlying federal labor law." *Id.* at 4 (quoting *NLRB v. K & K Gourmet Meats, Inc.*, 640 F.2d 460, 470 (3d Cir. 1981)). Finally, I am in accord with the position that one responsibility of a court of appeals charged with reviewing bargaining orders issued by the NLRB is to "draw[] the line at what it believes to be the point where the factual similarity between the present case and [*NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969)] is so tenuous, and the danger to employee free choice so strong, that applying the rule of [*Gissel*] is not justifiable." Dissenting opinion, typescript op. at 5. To do less, it seems to me, would be to adopt a "toothless" standard of review and to ignore our statutorily-imposed obligation to ensure that administrative bodies proceed rationally, fairly, and legally.

Unlike the dissent, however, I do not believe that we are justified in "drawing the *Gissel* line" so as to prevent the Board from imposing a bargaining order to remedy the unfair labor practices that were found to exist in this proceeding. There are three reasons for reaching this conclusion. First, I am persuaded that virtually all of the elements deemed significant by our previous cases in determining whether a bargaining order should have been issued were present in the record here. *See, e.g., Hedstrom Co. v. NLRB*, 629 F.2d 305, 312 (3d Cir. 1980) (in banc), *cert. denied*, 450 U.S. 996 (981); *Electrical Products Division of Midland-Ross Corp. v. NLRB*, 617 F.2d 977, 987 (3d Cir.), *cert. denied*, 449 U.S. 871 (1980). Second, I am convinced that this dispute is not on all fours with *K & K Gourmet Meats, supra*, which represents the limiting case with respect to the power of the Board in this regard. In my view, the dissent unjustifiably dismisses the Board's explicit finding that the presence of post-strike violations on the part of United Oil contributed significantly to an atmosphere that, in the Board's expert evaluation, could not be ad-

dressed by a more traditional remedy.[1] Finally, precisely because whether there are enough facts in the record to justify a bargaining order may be viewed as a close issue, it is appropriate to recognize what the Supreme Court has declared, namely, that in matters of this type, "the Board draws on a fund of knowledge and expertise all its own" and thus deserves to be accorded "special respect" as to its "choice of remedy." *Gissel, supra*, 395 U.S. at 612 n.32; *see also Universal Camera Corp. v. NLRB*, 340 U.S. 474 (1951).

In sum, despite my identification with many of the principles advanced in the dissenting opinion, I cannot conclude, after reviewing the record in this case, that the Board erred as a matter of law in imposing a bargaining order, given the "exceptional" circumstances involved here. Similarly, I cannot conclude that the Board somehow abused its discretion in determining that United's "serious unfair labor practices . . . ma[de] a fair election doubtful, if not impossible" and that "the use of traditional remedies [would] not suffice." Appendix at 50-51. Accordingly, while recognizing the question to be extremely close, I concur.

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1. The dissent suggests that legal effect be given to the ALJ's decision not to impose a bargaining order despite the presence of post-strike violations because such a decision, "if not solely [a] question[] of fact, at the very least [is] uniquely suited to determination by the ALJ." Dissenting opinion, typescript op. at 7 n.2. However, the primary authority cited by the dissent, Eastern Eng'r & Elevator Co. v. NLRB, 637 F.2d 191, 197 (3d Cir. 1980) (emphasis added), stands only for the proposition that "great weight" should be attached to "the *credibility* resolutions of an administrative law judge" — a proposition with which I agree, as apparently does Judge Sloviter. The Board's conclusion in this proceeding that a bargaining order is necessary simply represents the Board's application of the law to facts adduced by the ALJ, and consequently neither overturns a "credibility determination" of an ALJ nor undermines that official's essential fact-finding function.

VAN DUSEN, *Senior Circuit Judge*, dissenting:

As a reading of our opinions shows, this is not the first time in recent years that this court has struggled with the difficult issues raised by the National Labor Relations Board's issuance of an order to bargain as an unfair labor practice remedy. *See NLRB v. Permanent Label Corp.*, 657 F.2d 512 (3d Cir. 1981) (en banc); *NLRB v. K & K Gourmet Meats, Inc.*, 640 F.2d 460 (3d Cir. 1981); *Hedstrom Co. v. NLRB*, 629 F.2d 305 (3d Cir. 1980) (en banc), *cert. denied*, 450 U.S. 996 (1981).[1] I doubt that it will be the last. These cases, which seek to develop a consistently applicable standard of review of these orders, reflect the tremendous difficulty inherent in balancing the court's limited role in reviewing administrative action with its constitutional responsibility to constrain such agencies within the broad policies established for them by Congress. As is evidenced by the abovementioned two recent en banc decisions, the development and articulation of this standard is a matter of great concern to the active judges in which I do not presume to interfere. My concern here is with the result reached on the facts of this case. While the able and articulate majority opinion clearly sets forth the standard of review and applies it to a statement of facts with which I take no substantial exception, the result is to countenance a departure from the principles of the Act and the teaching of the Supreme Court that is so fundamental that I must respectfully dissent.

I.

I agree entirely with the majority opinion when it states that "[a]s in all cases where a bargaining order is

1. For a general discussion of the history of bargaining order enforcement in this circuit prior to these most recent cases, *see* Comment, *Enforcement of Collective Bargaining Orders in the Third Circuit: The Rise and Fall of the Armcor Standards*, 25 Vill. L. Rev. 913 (1980).

at issue, we start with the Supreme Court's decision in *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969)." *See* Majority Typescript Op. at 6. A close reading of *Gissel*, I believe, will crystallize the point of my disagreement with the result in this case. Before *Gissel*, a bargaining order could issue only "in 'exceptional' cases marked by 'outrageous' and 'pervasive' unfair labor practices [of] 'such a nature that their coercive effects cannot be eliminated by the application of traditional remedies.' " 395 U.S. at 613-14, *quoting NLRB v. Logan Packing Co.*, 386 F.2d 562, 570 (4th Cir. 1967). These are now called "*Gissel* I" orders. In *Gissel* itself, the United States Court of Appeals for the Fourth Circuit, relying on its own *Logan Packing* decision, took the position that this was the only situation in which a bargaining order was proper. *See* 395 U.S. at 611-13. In reversing, the Supreme Court recognized the continuing validity of the *Gissel* I orders, noted that "the actual area of disagreement between our position here and that of the Fourth Circuit *is not large as a practical matter*," *id.* at 613 (emphasis added), and explained:

> "The only effect of our holding here is to approve the Board's use of the bargaining order in less extraordinary cases marked by less pervasive practices which nonetheless still have the tendency to undermine majority strength and impede the election processes. The Board's authority to issue such an order on a lesser showing of employer misconduct is appropriate, we should reemphasize, where there is also a showing that at one point the union had a majority; in such a case, of course, effectuating ascertainable employee free choice becomes as important a goal as deterring employer misbehavior. In fashioning a remedy in the exercise of its discretion, then, the Board can properly take into consideration the extensiveness of an employer's unfair practices in terms of their past effect on election

> conditions and the likelihood of their recurrence in the future. If the Board finds that the possibility of erasing the effects of past practices and of ensuring a fair election (or a fair rerun) by the use of traditional remedies, though present, is slight and that employee sentiment once expressed through cards would, on balance, be better protected by a bargaining order, then such an order should issue . . . ."

Id. at 614-15. These orders, now called "*Gissel* II" orders, may thus be utilized by the Board, when it deems them necessary and appropriate, in less extraordinary cases than *Gissel* I orders. In my opinion, however, it is nothing less than a perversion of the Supreme Court's language to suggest, as the Board does in this case (Br. at 21 n.15), that a *Gissel* II order is not an extraordinary remedy. To say that a situation which justifies its use is "less extraordinary" than "outrageous and pervasive" by no means implies that a *Gissel* II order is not an extraordinary remedy which should be used only when the chance of success with a traditional remedy is "slight." As noted above, the Supreme Court in *Gissel* explicitly stated that its disagreement with the Fourth Circuit — and thus the difference between a *Gissel* I and *Gissel* II order — "is not large as a practical matter." 395 U.S. at 613.

The reason for this is quite straightforward. Although the majority opinion dismisses it as a "truism" (typescript op. at 6), I believe it is clear that a fundamental tenet of the national labor policy is that a Board-supervised, secret ballot election is "the preferred method of selecting bargaining representatives." The relationship between this fundamental tenet and the Supreme Court's recognition of the validity of a bargaining order in some situations was recently explained at length by Judge Rosenn in his majority opinion in *NLRB v. K & K Gourmet Meats, Inc., supra*, and I cannot improve on his articulation of it:

"The selection of an exclusive collective bargaining agent is not a game of chance but a matter of the highest importance to employees and employers alike. Legislation and experience indicate that an employee's statutory right to select an exclusive bargaining agent should be determined by democratic process in a free and open election. The Board's responsibility for holding such elections was not meant to be supplanted by the authority found to exist in Gissel. Only in exceptional circumstances, where it is obvious that the extensive machinery and power of the NLRB is inadequate to ensure a free election, should employees be denied their right to cast a secret ballot for or against an exclusive bargaining agent.[4] . . . . The bargaining order is an extraordinary remedy and, because it operates to disenfranchise the workers in the choice of their representative, it is appropriate only when the harmful effects of that disenfranchisement are outweighed by the positive advancement of the policies underlying federal labor law.

"4. The dissent submits that against the concern for employers and employees subject to bargaining orders must be weighed 'the strong federal policy in favor of the formation of collective bargaining relationships.' (Dissenting op., infra at 474.) On the contrary, we believe that the federal policy with respect to the formation of collective bargaining relationships is neutral. We view the thrust of federal policy as the protection 'of the right of employees to organize and bargain collectively' when they are so inclined. *See* 29 U.S.C. §151 (1976). *See also* 29 U.S.C. §157 (1976). Therefore, Congress in its declaration of national policy encouraging collective bargaining has also stated its policy in 'protecting the exercise of workers of full freedom of associ-

ation, self-organization and designation of representatives of their own choosing.' 29 U.S.C. §151. Freedom of association and free selection of a bargaining agent, however, may be substantially diminished by dependence on authorization cards.

"Cards have inherent uncertainties and risks attached to them. Even when the language is clear and unambiguous, the union solicitor may inform the signer that the card will be used only to obtain an election or merely to show interest in an election and that the language above the signature should be disregarded. *NLRB v. Boyer Bros., Inc.*, 448 F.2d 555 (3d Cir. 1971). It may be accompanied by representations that it is not a final designation until there is an election. *See Amalgamated Clothing Workers v. NLRB*, 365 F.2d 898, 906-08 (D.C.Cir. 1966). There may also be misrepresentations, *e.g.*, that a majority of the employees have signed authorization cards when in fact they have not. *See NLRB v. Savair Mfg. Co.*, 414 U.S. 270, 277, 94 S.Ct. 495, 498, 38 L.Ed.2d 495 (1973). The solicitations may also be attended by coercion or threats of reprisals and the employee's signature may not be the free and informed decision made in the privacy of a voting booth. *See Texaco, Inc. v. NLRB*, 436 F.2d 520. 524 (7th Cir. 1971). The Court in *Gissel* recognized that cards are 'admittedly inferior to the election process,' although they may perhaps be the only way of assuring employee choice when the employer engages in conduct disruptive of the election process. 395 U.S. at 602-03, 89 S.Ct. at 1934. As we note in the text, there is nothing in the record here to indicate that the Board could not conduct a fair election at the K & K plant."

640 F.2d at 469-70 & n.4. I believe, as did Judge Rosenn, that

> "In this case, and too often in others, the Board has looked upon a bargaining order as a convenient remedy for minor violations when traditional remedies could be equally effective and still preserve for employees their statutory right to select their exclusive bargaining agent by a democratic process in an open election."

Id. at 468 n.3. Where, as here, the facts bear no resemblance whatever to those of *Gissel* itself and where it appears that the Board is using a bargaining order for a purpose never intended, it is not a matter of this court substituting its judgment for the expertise of the Board or of saying that we would have decided differently in the first instance. Neither is it a question of what we will require of the Board by way of a statement of reasons or other procedural guarantees, such as concerned the court in *Hedstrom* and *Permanent Label*. Rather, it is this court drawing the line at what it believes to be the point where the factual similarity between the present case and *Gissel* is so tenuous, and the danger to employee free choice so strong, that applying the rule of that case is not justifiable. I would draw that line here.

II.

I must respectfully disagree with the majority's proffered factual distinctions between this case and *K & K Gourmet Meats* (*see* typescript op. at 10). First, the majority correctly observed that the ALJ in *K & K Gourmet Meats* found the unfair labor practices there to be "minimal" while the ALJ here found the promotions and wage increases to be "serious." Be that as it may, the law is not that a *Gissel* order is appropriate given "serious" unfair labor practices, but rather that an order may issue upon a finding that the possibility that a fair election may be had with traditional remedies is slight. It was this precise finding which the ALJ refused to make after

having observed the live testimony of the employee witnesses and making a firsthand evaluation of the workplace atmosphere. Thus, whatever, the ALJ may have meant by the term "serious," he clearly did not mean "sufficient to warrant a bargaining order." To then use the ALJ's subjective language to support a conclusion he himself refused to reach seems to me to be rather anomalous.

Next, the majority notes that the court upheld only two of the Board's five unfair labor practice findings in *K & K* while the unfair labor practices were conceded here. This is true but, I submit, not compelling for it is not the number of unfair labor practices but their effect which is the test. To presume such effect is, in Judge Rosenn's words, "the grossest kind of speculation." 640 F.2d at 469.

Finally, it is also true that this case involved a post-strike unfair labor practice, while all of the misconduct in *K & K Gourmet Meats* took place before the strike. Although this is a potentially relevant factual distinction between the cases, I do not believe it to be of substantial significance. The majority appears to accept for purposes of argument, as I will, the employer's argument that, as in *K & K*, the total success of the strike is an indication that the pre-strike unfair labor practices were not sufficient to undermine the union's majority (typescript op. at 10). They then rely on the post-strike actions here to distinguish the case. Thus, the validity of the distinction depends upon whether those unfair labor practices, either alone or when added to the pre-strike actions, were sufficient to irremediably undermine the union's majority status. This, again, is precisely the issue which the ALJ confronted and, based upon his firsthand observation of the witnesses, answered in the negative. The ALJ found:

> "The Board has acknowledged that not all 'serious unfair labor practices . . . are sufficiently egregious

> to warrant a bargaining order.' Although the line between patterns of misconduct which meet the test of pervasiveness is seldom free from doubt, having considered the total circumstances in this case, on balance, I am not convinced that the unfair labor practices herein were of a degree sufficient to prevent the holding of a free and fair election in the future . . . ."

ALJ opinion at 22, *reprinted at* 37a. This conclusion is, in my view, supported by substantial evidence while the contrary conclusion of the Board, rendered on the cold record, is not.[2]

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2. While I appreciate the thoughtful comments made in the concurring opinion, I must respectfully take issue with its conclusion that I have "unjustifiably dismiss[ed]" the Board's explicit finding on this issue. To the contrary, I have applied the standard of review articulated by our recent en banc cases and concluded that the Board's determination that the post-strike unfair labor practices render a fair election unlikely is not supported by substantial evidence. I so conclude because of my belief that the atmosphere of the workplace, the effect of the unfair labor practices on the employees, and possibility of a fair election are, if not solely questions of fact, at the very least issues uniquely suited to determination by the ALJ, who has heard the live testimony and observed the demeanor of the witnesses. Thus, even if I believed the question to be as close as the concurring judge feels that it is, I would still defer to the "long-standing policy of the NLRB [and the courts] to attach great weight to the credibility resolutions [and like questions such as mental state and workplace atmosphere] of an administrative law judge to the extent they are based on testimonial evidence of live witnesses and the hearing judge has had the opportunity to observe their demeanor." *Eastern Engineering & Elevator Co. v. N.L.R.B.*, 637 F.2d 191, 197 (3d Cir. 1980). *Accord, ABC Trans-National Transport v. N.L.R.B.*, 642 F.2d 675 (3d Cir. 1981). *Cf. N.L.R.B. v. Permanent Label Corp.*, 657 F.2d at 528 (Aldisert, J., concurring) ("the rigors of the selection procedure and the statutory protections of ALJ independence suggest to me that the federal judiciary need not look down its collective nose at ALJ decisions"). I feel much more secure resting an important decision implicating industrial democracy on a firsthand factual determination than on the nebulous concept of "Board expertise." *See Hedstrom Co. v. N.L.R.B.*, 629

In sum, I find the facts in *K & K Gourmet Meats* and the present case to be indistinguishable in any significant respect and the policy interests to be identical. Having no indication that *K & K* does not continue to be good law, I consider it to be controlling here.[3]

III.

To conclude, I would hold this court's decision in *K & K Gourmet Meats* to be controlling on its facts. Beyond that, I believe the facts of this case to be so far removed from *Gissel*, and, in fact, from this court's most recent divided opinion in *Permanent Label*, as to preclude the issuance of a bargaining order on the authority of those cases. While it is fundamental to our common law system that existing precedents be extended to new or differing factual situations, there comes a point where to go further is to do violence to the very policy underlying the early decision. In my opinion, that point has been reached in this case. The Supreme Court in *Gissel* simply never intended its extraordinary remedy to be expanded to the point where it becomes an equally attractive — or, in some cases, more attractive — alternative to a Board election. Nonetheless, a close reading of this case and its comparison with the facts of *K & K Gourmet*

NOTE 2 — *(Continued)*
F.2d at 324 (Rosenn, J., dissenting); Getman & Goldberg, *The Myth of Labor Board Expertise*, 39 U. Chi. L. Rev. 681 (1972). If *Permanent Label* counsels that an ALJ's determination of the unlikelihood of a fair election is to be respected because it is based upon firsthand observation of the witnesses, should not the same respect be afforded where, as here, the ALJ reaches the opposite conclusion?

3. Additionally, I do not read *K & K Gourmet Meats* as suggesting any hostility toward bargaining orders per se (*see* majority typescript op. at 10-11) and thus do not believe it to be in any way affected by the court's recent en banc decision in *Permanent Label*. In *K & K*, such hostility was suggested by the dissent, *see* 640 F.2d at 470 (Gibbons, J., dissenting), and explicitly disclaimed by Judge Rosenn, *see id.* at 467-68 n.3.

Meats leads me to the conclusion that current Board policy in this area has, in some cases, made it easier for a union to obtain a bargaining order than to prevail in a secret ballot election. The result of our enforcement of a bargaining order in such a case is to countenance the avoidance of an election and seeking of a bargaining order as a legitimate union campaign tactic at the expense of employee free choice. Even the dissent in *K & K Gourmet Meats* recognized this fact.[4] To me, such a result is so far beyond a reasonable reading of the Act or the *Gissel* opinion that I do not believe that any standard of review, even that articulated by the majority, is so strict as to leave us powerless to disapprove it.[5]

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4. The dissent observed:

"We are all well aware that in recent years labor unions have been winning far fewer contested elections than heretofore. A *Gissel* order insulates a union from the hazards of an election, and arguably tilts the scale too far in the union's favor. But the Supreme Court interpreted the Act in the *Gissel* cases to give the Board that authority, and Congress has not chosen to react. If I were a congressman requested to vote on overruling *Gissel*, I am not sure how I would vote."

640 F.2d at 473 (Gibbons, J., dissenting).

In this case, the union had achieved at best a bare card majority in a relatively small bargaining unit. While the majority correctly observes that the small size of the unit may magnify the effect of employer unfair labor practices and may more quickly undermine the union's majority, the reverse is also true. In such a small unit, the acceptance of only one or two unreliable cards may result in the certification of a union, without an election, against the wishes of the majority of employees. In this case, not only has there never been an election, but the union withdrew its petition for an election as soon as the employer committed any action upon which it could base a request for a bargaining order. This withdrawal came at the outset of the strike and before the post-strike unfair labor practice which the majority finds to be of such significance.

5. I note particularly that the recent decision of the Supreme Court in *Charles D. Bonano Linen Service, Inc. v. NLRB*, 50 U.S.L.W. 4087, 4091, relied on by the majority, held precisely that the courts should not substitute their judgment for that of the Board "with respect to the issues that Congress intended the Board should

Accordingly, I would grant the petition for review and deny the cross-application for enforcement.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit

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NOTE 5 — *(Continued)*
resolve." It distinguished the argument in the Chief Justice's dissent by noting that the dissent "does not suggest that the Board seeks here to promote illegitimate ends." *Id. Bonano*, therefore, provides no authority for the proposition that we are powerless to act when convinced that the Board is applying *Gissel* beyond where the Supreme Court, and by tacit acceptance Congress, intended.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

United Oil Manufacturing Co., Inc.,	)	
	)	
Petitioner,	)	
	)	
v.	)	
	)	No. 81-1478
National Labor Relations Board,	)	
	)	
Respondent.	)	

JUDGEMENT

Before: ADAMS, VAN DUSEN and SLOVITER, Circuit Judges

THIS CAUSE came on to be heard upon a petition filed by United Oil Manufacturing Co., to review an order of the National Labor Relations Board issued against said Petitioner, its officers, agents, successors, and assigns, on March 10, 1981, and upon a cross-application filed by the Naitonal Labor Relations Board to enforce said Order. The Court heard argument of respective counsel on October 27, 1981, and has considered the briefs and transcript of record filed in this cause. On February 22, 1982, the Court being fully advised in the premises, issued its opinion denying the petition for review and granting the Board's cross-application for enforcement. In conformity therewith, it is hereby

ORDERED AND ADJUDGED by the United States Court of Appeals for the Third Circuit that the Petitioner, United Oil Manufacturing Co., Inc., abide by and perform the directions of the Board contained in said Order.

BY THE COURT

_____

Circuit Judge

DATED: April 19, 1982

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 81-1478

UNITED OIL MANUFACTURING CO., INC.,
Petitioner

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent

SUR PETITION FOR REHEARING

Present: SEITZ, VAN DUSEN, ALDISERT, ADAMS, GIBBONS, HUNTER, WEIS, GARTH, HIGGINBOTHAM, SLOVITER and BECKER, *Circuit Judges*

The petition for rehearing filed by Petitioner, United Oil Manufacturing Co., Inc., in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

DOLORES K. SLOVITER
Circuit Judge

Dated: May 17, 1982

Judge Hunter would grant rehearing.

Judge Weis joins in the following statement made by Judge Garth:

GARTH, J.

I would grant the petition for rehearing because I agree with the petitioner and with Judge Van Dusen's dissent that the panel result here is in direct conflict with our decision in *NLRB v. K & K Gourmet Meats*, 640 F.2d 460 (3d Cir. 1981). Moreover, the Board's reasoning in issuing a bargaining order here, rather than ordering the preferred remedy of an election, is not only contrary to the teaching of *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969), but in the words of Judge Van Dusen it is "nothing less than a perversion of [Gissel] . . ." (Van Dusen, J., dissenting, slip op. at p. 18). In essence, by upholding the Board's bargaining order, the panel has virtually given *carte blanche* to the Board to impose bargaining orders when the spirit moves it, and to do so in complete disregard of *Gissel*.

Because I have previously expressed myself on this subject in a number of opinions, the most recent of which are *NLRB v. Permanent Label Corp.*, 657 F.2d 512, 528 (3d Cir. 1981) (en banc) (Garth, J., dissenting); *NLRB v. Eastern Steel*, 671 F.2d 104, 112 (3d Cir. 1982) (Garth, J., dissenting), and *NLRB v. National Car Rental*, No. 81-1180 (3d Cir. filed Feb. 18, 1982) (Garth, J., dissenting), I see no need to repeat my views which I have set forth in those writings.

I would therefore grant the petition for rehearing in this case.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

82-344

Office - Supreme Court, U.S.
FILED
AUG 13 1982
ALEXANDER L. STEVAS,
CLERK

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

UNITED OIL MANUFACTURING CO., INC.
Petitioner

v.

NATIONAL LABOR RELATIONS BOARD
Respondent

SUPPLEMENTAL APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Richard H. Zamboldi, Esquire

ELDERKIN, MARTIN, KELLY,
MESSINA & ZAMBOLDI
150 East Eighth Street, Box 1819
Jones School Square
Erie, Pennsylvania 16507
Counsel for Petitioner

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

UNITED OIL
MANUFACTURING CO., INC.

and

Cases 6 – CA – 12975 and
6 – CA – 13136

AMALGAMATED FOOD
EMPLOYEES UNION LOCAL
590, A/W UNITED FOOD AND
COMMERCIAL WORKERS
INTERNATIONAL UNION,
AFL–CIO

DECISION AND ORDER

On September 5, 1980, Administrative Law Judge Joel A. Harmatz issued the attached Decision in this proceeding. Thereafter, the General Counsel filed exceptions and a brief in support of the exceptions, and the Respondent filed cross-exceptions and a brief in opposition to the exceptions of the General Counsel and in support of its cross-exceptions.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge to the extent consistent herewith and to adopt his recommended Order as modified herein.[1]

---

1. Based on our own careful analysis of this case, we have determined that the Respondent, by the number and extent of its unfair labor practices, has engaged in such egregious and widespread misconduct as to demonstrate a general disregard for its employees' fundamental statuatory rights. We therefore find appropriate modification of the recommended order to include broad injunctive language against the further commission of any unfair labor practices by the Respondent. See *Hickmott Foods, Inc.*, 242 NLRB No. 177 (1979).

1. We agree that Administrative Law Judge properly found that Respondent violated Section 8 (a) (1) of the Act by promising wage increases and promotions, and by granting same, for the purpose of discouraging union activity. The Administrative Law Judge finds that such promotions and wage increases were granted to five employees, while actually a sixth employee, Greg Hevell, who is included in the appropriate unit, was also granted a wage increase and promotion at that same time. As in the case of the other five employees, the Respondent offered no business justification for Hevell's wage increase and promotion which occurred shortly after the Respondent gained knowledge of the union campaign. Hevell was only told the raise and promotion was due to the fact that the other employees behind the desk were promoted to shift managers. We conclude, as with the other five employees, that Hevell's wage raise and promotion was given for the purpose of discouraging union activity in violation of Section 8 (a) (1) of the Act.

2. The Administration Law Judge concluded that the unfair labor practices committed herein were not of a degree sufficient to prevent the holding of a free and fair election in the future and dismissed the 8 (a) (5) and (1) allegations in the complaint. We do not agree and we will adhere to the teachings of the Supreme Court as set forth in the *Gissel*[2] case:

> If the Board finds that the possibility of erasing the effects of past practices and of ensuring a fair election by the use of traditional remedies, though present, is slight and that employee sentiment once expressed through cards would on balance, be better protected by a bargaining order, then such order should issue.

We find that the unfair labor practices committed by the Respondent warrant the issuance of a bargaining order in this case.

---

2. *N.L.R.B.* v *Gissel Packing Co, Inc.*, 395 U.S. 575, 614 – 615 (1969).

The record shows that the Respondent embarked on its course of unlawful conduct upon learning of the Union's organizational campaign, when it coercively interrogated employee Zahuranec concerning the union activity of coworkers; and by instructing Zahuranec to report on union activity of co-workers and by promising wage increases, granting wage increases, and promoting employees to discourage their support of the Union. The above unfair labor practices of the Respondent occurred in a 5-day period from October 28 to November 3, 1979, and directly affected 7 of the 29 unit employees. Further, we are not unmindful of the Respondent's willingness to commit additional unfair labor practices. We note that in March 1980, with no justification other than to punish union supporters, the Respondent has failed to properly reinstate returning strike participants by denying to them overtime hours and pay in violation of Section 8 (a) (3) and (1) of the Act.

The commission of such serious unfair labor practices enumerated above, in a unit as small as the unit involved herein, makes a fair election doubtful, if not impossible. By its actions, Respondent clearly demonstrated to the employees that it alone controlled their economic destiny. After ascertaining the identity of the principal union supporters, Respondent sought to "buy them off" with rewards and promotions. When that failed Respondent took the reverse tack and punished them by denying overtime hours and pay. The message to the employees was that Respondent had the economic means at its disposal to achieve the result it desired. Such a powerful message cannot be erased or forgotten. Therefore, under these circumstances, the use of traditional remedies will not suffice. Accordingly, we conclude that a bargaining order would best protect employee sentiment already expressed through authorization cards.

The Administrative Law Judge found, and we agree that the following employees constitute a unit appropriate for purposes of collective bargaining.

> All full-time and regular part-time employees of the Employer at its Stop 21, Kylertown, Pennsylvania, facility, including diesel fuel station employees, gasoline

station employees, store employees and motel employees; excluding employees of the leased operations, confidential employees and guards, professional employees and supervisors as defined in the Act.

We also agree with the Administrative Law Judge that as of November 11, 1979, when the Union made its final demand for recognition, which the Respondent rejected, the Union had been designated by 17 employees in a unit of 29, clearly a majority.

For the reasons expressed above, we find that Respondent violated Section 8 (a) (5) and (1) of the Act by its refusal to recognize and bargain with the Union and that a bargaining order, effective from November 11, 1979, is an appropriate and necessary remedy.

Conclusions of Law

1. The Respondent is an employer engaged in commerce within the meaning of Section 2 (6) and (7) of the Act.

2. The Amalgamated Food Employees Union Local 590 a/w United Food and Commercial Workers International Union, AFL-CIO, is a labor organization within the meaning of Section 2 (5) of the Act.

3. Respondent independently violated Section 8 (a) (1) of the Act by coercively interrogating an employee concerning the union activity of coworkers; by instructing an employee to report on the union activity of coworkers; and by promising wage increases, granting wage increases, and promoting employees to discourage their support of the Union.

4. Respondent violated Section 8 (a) (3) and (1) of the Act by denying unfair labor practice strikers Delores A. Maines, Julio C. Leid, and Eugene S. Zahuranec overtime benefits they enjoyed prior to the strike.

5. All full-time and regular part-time employees of the Employer at its Stop 21, Kylertown, Pennsylvania, facility, including diesel fuel station employees, gasoline station employees, store employees and motel employees; excluding employees of the leased operations, confidential employees, guards, professional employees and supervisors as defined in the Act

constitute a unit appropriate for the purposes of collective-bargaining within the meaning of Section 9 (b) of the Act.

6. The aforementioned Union, since November 11, 1979, and at all times material herein, has been and is now the exclusive representative of all employees in the aforesaid appropriate unit for the purposes of collective bargaining within the meaning of Section 9 (a) of the Act.

7. Since November 11, 1979, Respondent has refused to bargain collectively with the above-named labor organization as the exclusive bargaining representative of all its employees in an appropriate unit, and thus has engaged in and is engaging in unfair labor practices within the meaning of Section 8 (a) (5) and (1) of the Act.

ORDER

Pursuant to Section 10 (c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge, as modified below, and hereby orders that the Respondent, United Oil Manufacturing Co., Inc., Kylertown, Pennsylvania, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, as so modified:

1. Substitute the following for paragraph 1 (c):

"(c) In any other manner interfering with, restraining, or coercing employees in the exercise of rights guaranteed them under Section 7 of the Act."

2. Insert the following as paragraph 2 (a) and reletter the subsequent paragraphs accordingly:

"(a) Recognize, effective from November 11, 1979, and, upon request, bargain collectively and in good faith with Amalgamated Food Employees Union Local 590, a/w United Food and Commercial Workers International Union, AFL–CIO, as the exclusive representative of all employees in the appropriate unit, with respect to rates of pay, wages, hours, and other terms and conditions of employment, and, if an understanding is

reached, embody such understanding in a signed agreement. The appropriate unit is:

> "All full-time and regular part-time employees of the Employer at its Stop 21, Kylertown, Pennsylvania, facility, including diesel fuel station employees, gasoline station employees, store employees and motel employees, excluding employees of the leased operations, confidential employees, and guards, professional employees and supervisors as defined in the Act."

3. Substitute the attached notice for that of the Administrative Law Judge.

Dated, Washington, D.C. March 10, 1981

John H. Fanning, Chairman

Howard Jenkins, Jr., Member

Don A. Zimmerman, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

WE WILL NOT interrogate our employees concerning their union activities or tell them to spy on coworkers and to report on their union activity.

WE WILL NOT promise our employees benefits, grant them benefits, or promote them in order to discourage them from engaging in activity on behalf of Amalgamated Food Employees Union Local 590, a/w United food and Commercial Workers International Union, AFL–CIO, or any other labor organization.

WE WILL NOT discourage membership in the aforesaid Union, or any other labor organization, by denying employment benefits to our employees because they have engaged in activity on behalf of a union.

WE WILL NOT in any other manner interfere with, restrain, or coerce employees in the exercise of rights guaranteed them by Section 7 of the National Labor Relations Act.

WE WILL restore overtime benefits enjoyed prior to the strike by Julio Leid, Delores Maines, and Eugene Zahuranec, and we shall make them whole for losses they sustained because we denied such overtime after the strike, with interest.

WE WILL recognize, effective from November 11, 1979, and, upon request, bargain collectively and in good faith with Amalgamated Food Employees Union Local 590, a/w United Food and Commercial Workers International Union, AFL–CIO, as the exclusive bargaining representative of all employees in the appropriate unit with respect to rates of pay, wages, hours, and other terms and conditions of employment and, if an under-

standing is reached, embody such understanding in a signed agreement. The appropriate bargaining unit is:

> All full-time and regular part-time employees at our Stop 21, Kylertown, Pennsylvania, facility, including diesel fuel station employees, gasoline station employees, store employees and motel employees; excluding employees of the leased operations, confidential employees and guards, professional employees and supervisors as defined in the Act.

United Oil Manufacturing Co., Inc
(Employer)

Dated _____ By _____
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Porter Building, 10th Floor, 601 Grant Street, Pittsburgh, Pennsylvania 15219, Telephone 412-644-2969.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

UNITED OIL
MANUFACTURING, CO.,INC.

and Case Nos. 6-CA-12975
6-CA-13136

AMALGAMATED FOOD
EMPLOYEES UNION LOCAL
590 a/w UNITED FOOD AND
COMMERCIAL WORKERS
INTERNATIONAL UNION,
AFL-CIO

Raymond Jacko, Esq., of
Pittsburgh, PA, for the
General Counsel.
Richard H. Zamboldi, Esq. and
Richard W. Perhacs, Esq.
(Elderkin, Martin, Kelly,
Messina & Zamboldi), of
Erie, PA, for the Respondent.

DECISION

Statement of the Case

JOEL A. HARMATZ, Administrative Law Judge: This proceeding was heard by the undersigned on May 29 and June 23, 1980, in Clearfield, Pennsylvania, upon an initial unfair labor practice charge filed on December 7, 1979, and a consolidated complaint issued on March 14, 1980, which, as amended, alleged that Respondent independently violated Section 8 (a) (1) by coercively interogating employees concerning union activity, by surveillance of union activity, by instructing an employee to report on union activity of co-workers, and by promising and

granting increases and promoting employees to discourage union activity, and that Respondent violated Section 8 (a) (3) and (1) of the Act by discharging employee Andrea Winters, in reprisal for union activity. The complaint further alleged that a strike commencing on or about November 12, 1979, was caused and prolonged by the aforesaid unfair labor practices, and that Respondent violated Section 8 (a) (3) and (1) of the Act by discriminating against certain strikers upon their unconditional offer to return to work. Finally the complaint alleged that Respondent violated Section 8 (a) (5) and (1) of the Act by refusing to recognize and bargain with the Union as majority representative of employees in the appropriate unit under authority of *N.L.R.B.* v *Gissel Manufacturing Company*, 395 U.S. 575 (1969). In its duly filed answer, Respondent denied that any unfair labor practices had been committed. After close of the hearing, briefs were filed on behalf of the General Counsel and the Respondent.

Upon the entire record in this proceeding, including my opportunity directly to observe the witnesses while testifying and their demeanor, and upon consideration of the post-hearing briefs, I make the following:

Findings of Fact

I. Jurisdiction

Respondent is a corporation with a place of business in Kylertown, Pennsylvania, the sole facility involved in this proceeding, from which it is engaged in the operation and management of a truck stop consisting of a retail gasoline station, diesel fuel station, store and motel. During the 12-month period ending December 1, 1979, in the course of said operation, Respondent derived gross revenues exceeding $500,000, and received goods and materials valued in excess of $5,000 shipped directly from points outside the Commonwealth of Pennsylvania.

The complaint alleges, the answer admits, and I find that Respondent is now, and had been at all times material herein, an employer engaged in commerce within the meaning of Section 2 (2), (6) and (7) of the Act.

II. The Labor Organization Involved

The complaint alleges, the answer admits, and I find that Amalgamated Food Employees Union Local 590 a/w United Food and Commercial Workers International Union, AFL-CIO, is, and has been at all times material herein, a labor organization within the meaning of Section 2 (5) of the Act.

III. The Alleged Unfair Labor Practices

A. The Issues

At the heart of this proceeding is the question of whether a remedial order directing Respondent to recognize and bargain with the Union is justified by the instant record. It is the theory of the General Counsel, that Respondent, shortly after the advent of union activity at the Kylertown truck stop, gained knowledge thereof through an informer, and embarked on a campaign of intimidation, commencing with an instruction that said employee report on events taking place at the first union meeting. It is contended that an act of union-related reprisal took place that same evening, following unlawful surveillance of the union meeting, when Respondent discharged Andrea Winters. Additionally, during the following week it is claimed that Respondent promised increases, promoted 5 employees and granted them increases to discourage union activity. According to the complaint, Respondent's initial unlawful reaction to the organization cameaign was followed by a strike which commemced on November 12, 1979, and which continued until March 10, 1980, when an unconditional offer to return to work was made on behalf of the strikers. It is the General Counsel's contention that this was an unfair labor practice strike, and that Respondent violated Section 8 (a) (3) and (1) of the Act, by failing to properly reinstate strikers Delores Maines, Julio C. Leid, and Eugene Zahuranec.

B. Background

This case is concerned with the segment of an initial organization campaign waged among Respondent's 30 employees at "Stop 21" on Interstate 80 in Kylertown, Pennsylvania. At that location, Respondent owns and operates a gasoline and diesel fuel station, a store, and a motel. Also at that site are other services, including a restaurant, a truck garage, and a barber shop, none of which are operated by Respondent, but by third persons pursuant to a lease or concession agreement. Employees of the leased operations are not involved in this proceeding even though within the Union's organization effort.

Respondent's work force at the Kylertown truck stop is subject to overall supervision by General Manager Cecil Felix. Essentially all alleged unfair labor practices set forth in the complaint are attributed to Felix.

There was no history of union representation at the truck stop. The instant organization campaign opened in late October 1979[1]/when employee Julio Leid contacted the Union and ultimately arranged for a union meeting to be held at her home at 4:00 p.m. on Sunday, October 28. Respondent admits that in the early afternoon on October 28, prior to the meeting, General manager Feliz was informed thereof. Five employees attended the first union meeting; namely, Leid, Eugene Zahuranec, Joyce Hockenberry, Sharon Shimmel, and Robert Pearce, Jr. All attending signed authorization cards, and thereafter signatures were solicited from among co-workers at the truck stop.

The General Counsel claims that Cecil was in the vicinity of Leid's home on October 28 at a time coresponding to the union meeting, under circumstances constituting surveillance violative of Section 8 (a) (1) of the Act.

Dischargee Andrea Winters did not attend the October 28 union meeting. However, she claims to have signed a card at the

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1. Unless otherwise indicated all dates refer to 1979.

home of Leid, shortly before reporting to work for her 11 p.m. shift. Upon arrival for work that same evening, she was discharged by Felix. The General Counsel claims that this discharge was for discriminatory reasons violative of Section 8 (a) (3) and (1) of the Act.

At some during the week following the October 28 union meeting one employee was told he would receive a wage increase and at least five others were reclassified and designated as "managers", while being afforded wage increases. Here again, Respondent is charged with 8 (a) (1) violations.

On November 3, the Union's International Representative George Nestler personally contacted Felix, demanding recognition of Respondent's employees in the appropriate unit. This was followed by a letter dated November 5, directed to James Gray, Respondent's president, which also included a demand for recognition. In a telephone conversation on November 11, Felix informed Nestler that recognition would not be conferred, as he wished a "fair election". In that conversation, Nestler charged that Felix had theretofore interfered with the possibility for a fair election.

On November 11, a union meeting was held wherein employees voted to strike in protest of the alleged unfair labor practices. The strike began on November 12, 1979, and continued until March 10, 1980, when an unconditional offer to return to work was made on behalf of the strikers.

In the interim, the Union filed a representation petition on December 7, 1979 in Case No. 6-RC-8654. After hearing thereon, the Regional Director issued a Decision and Direction of Election on January 29, 1980. On March 19, 1980, the Union's request to withdraw said petition was granted.[2]

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2. On behalf of the Respondent it is contended that the various actions of the Union with respect to the representation proceeding, in which the unit preference expressed by the Union was rejected, signifies that the Union was of the position that a fair election could be conducted. Whatever interpretation might be placed on the Union's tactical actions in that connection, whether or not a bargaining order should issue under the *Gissel* doctrine must be assessed in the light of unfair labor practices substantiated by the record in this proceeding. All other references are irrelevant to that inquiry.

By letter of March 10, 1980, an unconditional offer to return to work was made on behalf of the strikers. The General Counsel contends that the strike was an unfair labor practice strike, that the participants therein were entitled to the protection accorded unfair labor practice strikers, and that Respondent violated Section 8 (a) (3) and (1) of the Act by failing to restore Delores Maines to her former position, and by denying strikers Leid, Zahuranec, and Maines, overtime assignments that they had regularly enjoyed prior to the strike.

C. Concluding Findings

1. Interference, Restraint, and Coercion

a. The October 28, Union Meeting

On October 28 a union meeting was held as scheduled at the home of Julio Leid. Eugene Zahuranec was among the employees invited to attend. Because scheduled to work from 10 a.m. to 6 p.m. on October 28, according to Zahuranec, at approximately mid-day he went to the office of Felix, and inquired as to how Felix felt about a union. Felix indicated that he did not know, but questioned Zahuranec as to why he had asked. Zahuranec reported that a union meeting was to be held at Leid's house at 4 p.m. and requested time off to attend. Felix then queried Zahuranec as to the identity of others who were to attend. Zahuranec replied that fuel jockeys, desk people and field clerks would be there. Felix then specified individuals, asking if they would attend. Zahuranec denied knowledge. Felix told Zahuranec to go to the meeting and to call him at the conclusion thereof to report what had happened. In the course of the conversation, Felix opined that the Union was no good, and that it had caused problems at another truck stop.[3]

3. Felix admitted to this conversation and that he was infomed of the union meeting. However, he denied questioning Zahuranec as to any aspect of it, but claims that all information was volunteered by the latter. He also denied that he made a request that Zahuranec report back on what transpired at the meeting. I prefer the testimony of Zahuranec, who at the time of the hearing, remained in Respondent's employ. Zahuranec's account seemed the more likely and was entirely believable. Basically, I did not regard Felix as a trustworthy witness.

According to the further testimony of Zahuranec, on Monday morning, October 29, he received a telephone call from Felix, in which the latter inquired as to what went on at the meeting, who attended, and who the instigator of union activity was. In response, Zahuranec identified those who attended, and indicated that it was his understanding the Union had been contacted by Julio Leid. Felix went on to question Zahuranec as to why he had not called Felix, and as to whether restaurant employees were involved. At the close of the conversation, Felix appealed to Zahuranec to refrain from disclosing that Felix was aware of the organization effort. [4]

Based upon the credited testimony of Zahuranec, I find that Respondent violated Section 8 (a) (1) of the Act by Felix questioning the latter concerning union activity of co-workers, by instructing Zahuranec to report on the union activity of co-workers, and by his broad questioning of Zahuranec as to what transpired at the union meeting of October 28.

The complaint also alleges that Respondent violated Section 8 (a) (1) through Felix's suveillance of the union meeting. In this regard, it is clear, that prior thereto, Felix had acquired knowledge of the time and location of the meeting, which took place between 4:00 and approximately 5:00 p.m. on October 28 as scheduled. Leid testified that at approximately 4:45 or 5:00 p.m. as she and union representative Nestler attempted to

4. Here again I credit Zahuranec. Felix admitted to calling Zahuranec at 9 a.m. on October 29, but claims that he did so to find out whether Zahuranec's father was going to do a personal favor for him. After discussing that subject, it is the sense of Felix's testimony, that Zahuranec injected the Union, volunteering the names of the people who attended the union meeting. Felix denied asking further questions and again indicated that Zahuranec volunteered to keep him informed as to union activity. Felix further testified that a few days later, Zahuranec approached him asking Felix to tell anyone inquiring as to their prior phone conversation, that it merely related to the favor Felix requested of Zahuranec's father, and that the party Zahuranec told Felix about " . . . was just a party at Julio's. . . . " I have heretofore expressed doubt concerning Felix's credulty. Here again, his testimony did not ring true, and I regarded that of incumbent employee Zahuranec as the more probable.

obtain organizing materials from Nestler's car which was then parked in front of her home, she observed Felix in his personal automobile pass by her house at a rate of speed which she estimated to be at between 25 and 30 mph in a 45 mph zone.[5] Felix denied that he was in the vicinity of Leid's home on October 28.

Nothwithstanding my misgivings concerning the verity of Felix, and accepting the fact that Leid was an incumbent employee at the time of the hearing, I find the surveillance allegation unsupported by credible proof. The testimony of Leid and Nestler was gravely suspect. As shall be seen, *infra*, Leid in collaboration with Andrea Winters and Vera Lockey afforded highly material testimony in connection with the discharge of Winters which impressed the undersigned as pure fabrication. As for Nestler, his avowed ability to make an after the fact positive identification on the basis of an instantaneous, passing glimpse at dusk of one he had never before seen, created sufficient doubt to reflect adversely upon his credulity. I did not believe Leid or Nestler and this allegation based upon their testimony shall be dismissed.[6]

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5. Leid was corroborated by Nestler, who related that though he did not know Felix at the time, his presence was called to his attention by Leid whereupon he immediately turned, observing the driver of the automobile. Although Nestler at the time had not as yet met Felix, he asserted that he was able to confirm the identification upon subsequently meeting Felix 5 days later.

6. The complaint alleges that Respondent independently violated Section 8 (a) (1) of the Act by informing its employees on or about October 28, that it was futile for them to select the Union as their bargaining representative. From my examination of the record, no evidence was adduced in substantiation of this claim by the General Counsel, and this allegation is dismissed.

b. The Promise of Wage Increase and Grant of Promotions and Wage Increases.

Uncontradicted evidence establishes that on November 3, enclosed with their paychecks, *certain employees* received an announcement signed by Felix, which indicated as follows:

To: All Employees of Stop 21 Fuel Station
Subject: Assignment of Areas of Responsibility and Rate Change.

As of 27 October 1979, the following employees of Stop 21 are designated Shift managers and are responsible for supervising the working activities of personnel assigned to their shift:

	Rate
Joyce Hockenberry	$3.55
Jean Kerns	$3.35
Marlene Grate	$3.10
Delores Maines	$3.10
Julio Leid (Store Manager)	$3.50

_____ [s]
Cecil Felix, Manager

Julio Leid, at times prior to the above announcement, had been employed for 2 years as store cashier. According to her uncontradicted testimony, Leid, on October 29, was first informed as to the possibility of a promotion and wage increase. At that time, she was called into the office of Felix, who indicated that he was considering giving her more authority, inquiring further if Leid were willing to assume management of the store at a 20 cent increase. In this instance I accept Leid's uncontradicted testimony. As mutually corroborative testimony by Felix and Zahuranec reveals, this occurred after Felix had received information pointing to Julio as the instigator of union activity.

Respondent's evidence includes no explanation for this sudden upgrading of the above-mentioned employees and the grant of an increase, shortly after acquisition of knowledge that a union campaign was in progress. Pursuant to established Board

precedent, new benefits announced and/or granted during an organization campaign are unlawful unless the employer can establish that such benefits were based upon business justification disassociated from the existence of union activity. While no effort has been made by Respondent to refute the inference of illicit motiv[illegible] in this respect, the 8 (a) (1) allegations are bolstered by the propensities disclosed through testimony of former shift manager Hevell. The latter credibly, and without contradiction testified that subsequently during the course of the strike, Felix told Hevell that if he had known about the Union sooner, he would have reclassified the "fuel jockeys" as "island supervisors". Based upon the foregoing, I find that Respondent violated Section 8 (a) (1) by promising wage increases and promotions, and by granting same, for the purposes of discouraging union activity. [7]

2. The Alleged Discrimination

a. The Discharge of Andrea Winters

The discharge of Winters occured on October 28, shortly after 11 p.m., several hours after the union meeting which took place at the home of Julio Leid. She did not attend that meeting, but claims, with corroboration from Leid, that in route to work shortly before 11 p.m., she stopped at Leid's home and executed a signed authorization card.

Prior to her discharge, Winters had been employed as a fuel clerk (cahsier) on the 11 p.m. to 7 a.m. shift. Undisputed credited

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7. It is also noted in this respect that Zahuranec credibly testified that on or about October 30, Felix advised Zahuranec that a 25-cent wage increase had been obtained for him. Zahuranec acknowledged that he never received the increase. Although Felix denied the foregoing, he related that during the first week after the union meeting Zahuranec approached him, requesting a raise. Felix's testimony in this respect conformed with a consistent pattern of unbelievable testimony through which Felix shifted statements to Zahuranec, which I believe he himself made. Felix also admitted that he sought approval of said increase from headquarters. Although Zahuranec's testimony in this respect is somewhat cumulative, I credit his account as the more likely.

evidence establishes that at least since January 1979, Winters in that capacity sustained cash shortages at the close of her shift more frequently than any of her co-workers.

The groundwork for her discharge originated with action by respondent taken prior to the advent of union activity. Thus, on September 25, 1979, a notice to employees was posted which recited as follows:

To: All Fuel and Store Clerks

1. As of September 25, 1979, all employee [sic] are responsible for any and all shortage [sic] amounting to two dollars ($2.00) and over.

2. Shortage will be paid on the first payday after shortage has occurred.

3. After the second offense amounting to fifteen dollars ($15.00) and over; means automatic dismissel uless [sic] proven that the shortage was not entirely their own fault.

Winters, though aware of this newly established policy, on October 24, 1979, had a cash shortage of $19 which was unexplained. Again, on Saturday, October 27, 1979, Winters was short, $28.32.

Judy Rolley, Felix's secretary, confirmed credibly that there was no explanation for Winters' shortage of October 23. She related that, as part of her duties, she checked the "daily truck reports" completed by fuel clerks for each shift and compared the cash on hand at the end of each shift with register readings and the data entered by each individual cashier on her respective report. Rolley testified that she reported for work at 9 a.m. on Sunday, October 28.[8] Upon her arrival, Felix who had apparently

8. Rolley credibly testified that, while she normally worked Monday thru Friday, she also worked weekends when the end of the month fell on a weekend or prior to taking a vacation. I find, consistent with her testimony, that she worked on October 28, because her scheduled vacation was to begin that following Monday.

pulled the reports from the following evening, informed her that Winters had been short again, and instructed her to check out Winters' report because she was "going down the road if she was short." According to Rolley, she carefully checked the data relative to Winters' cash status on October 27, and could find no explanation for the shortage. Before leaving at approximately 1 p.m. on October 28, Rolley informed Felix to this effect, at which point Felix indicated "I've had it with that damn girl . . . she's going down the road."

According to Winters' own testimony, she had not manifested any support of the union till 10:45 p.m. on October 28. further, there is no hard evidence, nor basis for fairly drawn inference on this record, that as of 1 p.m. on October 28, Respondent suspected that Winters had engaged in union activity.[9]

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9. Although Winters, with corroboration from Leid, testified that she signed a card at approximately 10:45 p.m. on Ocotber 28, deep suspicion is held that such was the case. Winters, though invited, did not attend the union meeting earlier that day. According to Leid, "something" came up and Winters could not attend. Winters own explanation for her absence was garbled and unimpressive. Questions held as to Winters procrastination concerning the Union on October 28, were intensified by the testimony of Vera Lockey. Lockey, a good friend of Winters, lived only a few doors away from Leid. Though among those invited to the meeting, she, like Winters did not attend. Within Lockey's testimony was a reference plainly calculated to support a contention that Respondent had reasonable basis for believing that Winters, prior to her discharge, had participated in union activity. Thus, Lockey testified that Winters was at her home at least twice on October 28, first between 2:00 and 4:00 p.m. and second between 6:00 and 10:00 p.m. This testimony of Lockey places Winters within a few hundred feet of Leid's home, the site of the meeting, during a substantial segment of the day. Yet, as the testimony offered by the General counsel would have me believe, she did not attend the meeting or sign a card prior to her final departure from Lockey's home at 10 p.m., but returned to the area a third time in route to work to sign a card. Lockey's explanation for not attending the union meeting was also unbelievable. According to Lockey, she had a hangover as a result of a night on the town in State College, Pennsylvania, with Winters the previous evening. Respondent's Exhibit 6, however, shows that Winters worked the 11 p.m. to 7 a.m. shift on Saturday, October 27. The testimony of Lockey and Winters that, on October 28, they separately went to the home of Leid where they signed cards is rejected as predicated upon unvelievable testimony. My disbelief of this entire segment of the General Counsel's proof contributed to my adverse impression of Leid's general reliability. Her attempt at corroboration in connection with this highly material issue, placed Leid in complicity with others in an effort to bend the truth in support of the claim that Winters was a victim of unlawful discrimination. Her testimony in other areas has been rejected where not corroborated by evidence from credible sources or unless based on facts within the knowledge of the Respondent but not contradicted.

Respondent has offered convincing proof that Winters violated its published policy concerning shortages,[10] and that its action in terminating her was consistent with the declared penalty of "automatic" discharge. This evidence was not countered, on behalf of the complaint, by credible proof either that Winters prior to her discharge engaged in union activity, or that Respondent had any reasonable basis for suspecting that she had.[11] Also absent was evidence showing that the shortage policy had been disparately applied. In sum, I find that the General Counsel has not maintained by preponderance of the evidence that Winters was terminated in violation of Section 8 (a) (3) and (1) of the Act, and accordingly, the complaint shall be dismissed in that regard.[12]

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10. I did not believe the testimony of Winters that her shortage of October 27 was not her fault, but attributable to erroneous recordings on the gas pumps. This constituted a self-serving argument on behalf of an unreliable witness and was not taken by the undersigned as anything more. The fact that her cash checked out with all other documentation would not necessarily mean that the pumps were in error or that a shortage did not occur which could fairly be deemed the responsibility of Winters.

11. The General Counsel claims that a statement made by Felix to Hevell on October 28, indicated that Felix suspected that Winters and her friend Lockey were involved in the organization effort. This related to testimony of Hevell that Felix, as he could recall, told him that Winters would be discharged, adding that he wished that Vera Lockey would quit. Although this testimony plainly discloses that Felix disapproved of Winters and Lockey, to assume that his attitude was in any sense influenced by union activity would be to indulge in brazen speculation.

12. In so finding, I have not overlooked certain circumstances surrounding the discharge, including the fact that Felix returned to the truck stop on Sunday, to personally effect the discharge, rather than using Hevell to communicate to Winters his intention in that regard. Any suspicion, however, that might arise therefrom, when weighed against other credible facts on this record, fails to overcome the deficiencies in the General Counsel's case. Also considered, but deemed inconclusive, was the fact that during a prehearing interview with an agent of the National Labor Relations Board, Felix expressed a ground unrelated to shortages as contributing to the discharge decision. In this latter respect, this reference is deemed no more than an aggressive act of bias emerging from human tendency. One embroiled in controversy frequently overreaches in attempting to caste the opposition in the most unfavorable light possible. It is assumed that no more was involved here. The foregoing was not viewed as rising to the level of a shifting defense undermining the otherwise valid grounds for the discharge.

3. The Alleged Post-Strike Discrimination

a. The Nature of the Strike

The complaint alleges that the strike which began on November 12, was caused and prolonged by Respondent's unlawful conduct and hence was an unfair labor practice strike. In this connection, it is noted that on November 11, the Union was first informed that Respondent would not honor its request for recognition, but preferred an election. Later that evening, a union meeting was held. According to George Nestler, the Union's international representative, the purpose of that meeting" ... was to inform all the people of the events that had happened and what the response of the Company was, at this time ... And what we, as a group, could do in the future to gain recognition." He claims that because of the alleged unfair labor practices, including the wage increases, the discharge of Winters, and the surveillance of the October 28 union meeting, he conducted a strike vote.[13] Those attending the November 11 meeting opted to strike and pickets appeared at the truck stop the next day.

Having found that prior thereto, Respondent created a serious obstacle to representation by virtue of its unlawful attempt to influence employees by promises of benefits, and actual grant of promotions and wage increases, I find that the strike which began on November 12, was caused at least in part, by the aforesaid unfair labor practices.[14]

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13. The only other unfair labor practices involved here related to the conversations between Felix and Zahuranec. Yet, there is no evidence that Zahuranec ar of November 11, had communicated the substance of those incidents to tne Union, or for that matter, to anyone else. Indeed, the only interrogation mentioned in Nestler's testimony related to that of employees at the Bell restaurant. The unfair labor practice findings based on Zahuranec's testimony are not considered as among the motivating causes of the strike.

14. See *C & E Stores, Inc., C & E Super Value Division*, 221 NLRB 1321, 1322.

On March 10, 1980, the strike ended, with an offer to return to work made on behalf of all strikers unconditionally.[15] Apparently, pursuant thereto, all strikers who wished reemployment were restored. The 8 (a) (3) allegations based upon the post-strike treatment are limited to alleged curtailment of the employment benefits of strikers Leid, Maines and Zahuranec upon their reinstatement after the strike.

b. Julio Leid

Leid testified without contradiction and in this instance credibly that prior to the strike, she, during overtime hours, assisted in the taking of a physical inventory at the end of each month. It is undisputed that upon her return, Leid was not afforded such opportunity to earn overtime pay.

Because of the nature of the strike, Respondent, pursuant to established Board policy, was required to reinstate "all its employees who participated therein to their former positions or if such positions no longer exist, to substantially equivalent positions, without impairment of their seniority and other rights and privileges dismissing, if necessary, any persons hired as replacements on and after "the inception of strike action.[16] Where restoration is not accorded under such conditions, the burden is upon the employer to demonstrate" ". . .it had a substantial and legitimate business reason for not doing so."[17] In the case of Leid, the defense is based exclusively upon testimony of Felix through which he vaguely alluded to problems experienced with the accuracy of the inventory. To accomodate them, according to Felix, he dispensed with overtime, instead taking the inventory with assistance of the employee on duty at the time. No explanation was offered as to how the accuracy of the inventory could be improved under such procedure. Indeed, one would naturally assume that the opportunity for error would be enhanced by the utilization of an employee whose responsibility for ongoing store operations would be a distracting influence upon her role in connection with the inventory.

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15. See Joint Exhibit 2.

16. See *Larand Leisurelies, Inc.*, 213 NLRB 197, 198 (1974).

17. See *Weather Tee Corporation*, 238 NLRB 210, p. 4 (1978).

I find the testimony of Felix in this respect to be unpersuasive and incredible. As Respondent has failed to establish any supervening economic justification since the commencement of the strike for its denial of overtime to Leid, it thereby violated Section 8 (a) (3) and (1) of the Act by failing to extend the same privilege upon her restoration at the conclusion thereof.

c. Delores Maines

Prior to the strike, Maines was a fuel desk cashier. Upon her return to work in 1980, she was not accorded that position, but was restored as a store cashier, a position she had not previously occupied. This occurred in spite of the fact that Cindy Carson, an employee who did not occupy a fuel clerk position prior to the strike, continued thereafter to be retained in that capacity.

Maines testified that she did not like the position of store clerk as well as her pre-strike job. However, the former seemed to the undersigned to involve less onerous work and Maines did not advise management concerning her preferences until May 1980. When she did so, she was reassigned to the fuel desk on the swing shift.[18]

On the other hand, the record shows that as store clerk, she was not awarded the overtime customarily enjoyed in her pre-strike position as fuel clerk. Respondent has not shown that this failure to restore Maines with all the benefits previously enjoyed to have been justified by supervening economic considerations. Accordingly, Respondent thereby violated Section 8 (a) (3) and (1) of the Act.

d. Steve Zahuranec

Zahuranec after the strike was restored to his former position as a fuel jockey. Respondent's payroll records show that prior to

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18. Proior to the strike, and until October 28, when Winters was discharged, Maines' assignment on the fuel desk was on a "swing shift" basis. After the discharge of Winters, she worked as the latter's replacement from 11 p.m. to 7 a.m. until the strike began.

the strike and since January 1, 1979, Zahuranec was assigned overtime during 39 separate weeks. After the strike, he was offered overtime on but a single occasion and declined it. According to Zahuranec, his pre-strike overtime was attributable to the fact that he regularly worked on Sundays, an overtime shift, and also approximately twice weekly when he earned a half hour of overtime for transporting oil from Respondent's storage area to its sales area with his own pick-up truck.

Felix testified that since the strike, oil and gasoline sales had declined significantly and that in consequence fuel jockeys were not assigned overtime except on what may be considered an emergency fill-in basis. Also the fall off in oil sales volume enabled transport of oil without need for a motor vehicle and permitted this work to be done during regular working hours. Payroll records in evidence are not inconsistent with this testimony and I credit Felix in this respect.

However, the reduction in sales volume fails to explain the denial, after the strike, of the additional overtime shift Zahuranec enjoyed prior to the strike. Respondent's operation after the strike continued on a round-the-clock, 7-day basis. From all appearances, premium pay was as costly before the strike as after and no evidence was adduced specifically as to why this expense was not to be sustained at its conclusion. Accordingly, in this limited respect, I find that Respondent violated Section 8 (a) (3) and (1) of the Act by failing to provide Zahuranec with the overtime he enjoyed prior to the strike.

The Remedy

A. The Refusal to Bargain

1. Preliminary Statement

The consolidated complaint in this proceeding alleges that the unfair labor practices alleged therein entailed "a course of conduct precluding the holding of a fair election among the

employees in the unit . . ." Accordingly, it is claimed that entry of a remedial order requiring Respondent to recognize and bargaining with the Union as exclusive majority representative of employees in the appropriate unit is warranted under authority of *N.L.R.B. v. Gissel Packing Co., Inc.*, 395 U.S. 575 (1969). Such relief was authorized by the Supreme Court under conditions where " . . . the extensiveness of an employer's unfair labor practices in terms of their past effect on election conditions and the likelihood of their recurrence in the future . . . [indicates] . . . that the possibility of erasing the effects of past practices and of insuring a fair election (or a fair rerun) by the use of traditional remedies, through present, is slight . . ."[19]

2.The Demands for Recognition

Respondent in defense of the refusal to bargain first contends that the Union's various requests for recognition and bargaining were defective and insufficient to support a violation of Section 8 (a) (5). The initial request was made orally on November 3 when Nestler appeared at the truck stop simply informing Felix that " . . .we had the majority of the employees signed up" and are present for "the purpose of union recognition. . . ." This was followed by letter dated November 5, through which the Union effected a formal demand for recognition, describing the unit sought as follows:

> All full-time and part-time employees employed by United Oil Corporation at your Kylertown Truck Stop 21, Clearfield County.
>
> Excluding: All other employees and guards, professional employees and supervisors as defined in the Act.

On November 11, by telephone, Nestler again iterated to Felix a demand for recognition, at which point, Felix expressed the desire for "a fair election".

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19. 395 U.S. at p. 614.

Nonetheless, Respondent contends that the aforesaid demands were in an inappropriate unit as the Union at all times material sought inclusion of employees of concessionaires. The defense in the circumstances, is lacking in merit. Insofar as this record discloses, all formal and informal communication by the Union as to the employees sought was confined to employees of the Respondent. Hence the claim on behalf of Respondent that the requests for recognition were fatally defective is based upon matters collateral to the exchange between the parties which preceded rejection of recognition. It rests upon the fact that the organization drive was not only waged among Respondent's employees at the truck stop, but also employees of a restaurant operated independently pursuant to lease. Only after the Union filed its representation petition in Case No. 6-RC-8654 on December 7, did it become manifest that the Union sought inclusion of the restaurant employees in the unit. In his Decision and Direction of Election dated January 29, 1980, the Regional Director concluded that restaurant employees were not employed by the Respondent, that no joint employer relationship existed which would warrant their inclusion, and that therefore said individuals were to be excluded.

The question presented is whether a demand, though sufficient to apprise the employer of the employees sought at the time of rejection, is imperiled by a subsequently manifested dispute within the frame work of that general unit description which is subsequently in a representation proceeding, resolved against the Union. I think not. The principle endorced by the Supreme Court in *Gissel, supra,* is remedial in nature, and as such, is to be construed and applied without frustration through technical conceptions founded upon the irrelevant. consistent therewith, the propriety of a Union's demand ought be controlled solely with reference to knowledge possessed by the employer when it opts to reject a demand, which, as here, on its face was co-extensive with the unit ultimately deemed appropriate. Here, no substantial variation appears in the scope of the unit defined in the Union's letter of November 5 and that ultimately set forth as

appropriate in the Regional Director's Direction of Election of January 29, 1980.[20] The record is devoid of evidence signifying that on November 11, when Felix rejected the Union's demand, Respondent was mindful that the Union was seeking inclusion of restaurant employees within the unit. Insofar as this record discloses, Respondent was not apprised of that fact until sometime after the Union filed its election petition on December 7. The subsequently declared position of the Union seeking to include within the unit a class of employees which later was rightfully excluded, constitutes no more than a supervening event which failed to alter the facts existing at the time that recognition was rejected, and serves as no impediment to the availability of the special remedy sanctioned by *Gissel Manufacturing Co., supra.*

B. The Appropriate Unit

The complaint alleges, the answer admits, and I find that the following employees constituted a unit appropriate for purposes of collective bargaining:

> All full-time and regular part-time employees of the employer at its Stop 21, Kylertown, Pennsylvania, facility including diesel fuel station employees, gasoline station employees, store employees and motel employees; excluding employees of the leased operations, confidential employees and guards, professional employees and supervisors as defined in the Act.

C. The Union's Majority

On behalf of the General Counsel's claim that the Union represented a majority, some 20 authorization cards were received in evidence. The cards themselves include a clear and unambiguous disignation which on their face authorize the Union to represent and bargain on behalf of the signer. No dispute exists as to the cards executed by employees listed on Appendix B attached hereto. Said cards are found to have been authenticated by credible evidence and to represent valid

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20. Compare Joint Exhibit 1 with Joint Exhibit 3.

designations contributing to the Union's alleged majority in this proceeding. Based thereon, I find that as of November 11, when the Union made its final demand, which Respondent rejected, it possessed at *least 13 signed* designations.[21]

A dispute exists as to validity of the authorization cards in evidence bearing the signatures of *Marion Welker, Charles Gibbons* and *Jean Kerns.*

Respondent challenges the card of Charles Gibbons as having been executed upon an improper representation. The alleged infirmity is founded upon the segment of testimony exacted from Gibbons on cross-examination by Respondent's counsel, which is set forth below:

Mr. Zamboldi: Did another employee present it [the authorizatin card] to you?

Gibbons: Yes. Sharon Shimmel.

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21. It is noted in this connection that a properly authenticated card bearing the signature of David F. Hoover, Jr. was received in evidence. However., as that card was dated November 15, it has not been counted in assessing the Union's status. Further, the card of *Vera Lockey* is rejected. Lockey, together with corroborating witness Leid, afforded incredible testimony in connection with the union activity of Andrea Winter. Although I shall count the card of Julio Leid, because her testimony authenticating her own designation was supported by collateral evidence of a truthful nature, the authenticating testimony in the case of Lockey is suspect and my general distrust thereof requires rejection of testimony that she actually signed the card prior to the critical date. The card of *Andrea Winters* is rejected on grounds that she was lawfully terminated prior to the critical date for assessment of the Union's majority. In counting the card of *Delores Maines,* I have not overlooked the fact that it was dated November 1, 1979, but not actuallysigned until November 5, 1979. Based on the credited testimony of Maines, I find that she did in fact designate the Union on November 5, and that her card contributes to the alleged majority of the Union in this proceeding.

Mr. Zamboldi: When she requested that you sign it, what did she tell you?

Gibbons: They just told me that they were trying to get a union in at the truck stop and that's all she told me.

Mr. Zamboldi: Did she tell you that you were the only one at the stop that hadn't signed a card at that time?

Gibbons: Yes she did.

In counting the card of Gibbons, I note that such a shot-gun response to prejudicially leading examination with respect to the issue of fraud in the inducement, is deemed too unreliable to warrant credence with respect to representations made to Gibbons at the time he signed. Furthermore, Gibbons read the card before signing and there is neither objective nor other form of evidence suggesting that he relied upon any such statement in designating the Union. In *Marie Phillips, Inc.*, 187 NLRB 340 (1969), the Board stated:

> We continue to believe that a showing, without more, of a misrepresentation as to the number of others who have signed is insufficient to invalidate a clear and unequivocal designation card signed by an employee. This is so because such a card must be presumed to express the individual intent of the signer regardless of the wishes of others.
>
> * * *
>
> Where the objective facts, as evidence by events contemporaneous with the signing, clearly demonstrate that the misrepresentation was a decisive factor in causing an employee to sign a card, we shall not count such card in determining the Union's majority. However, . . . where the only indication of reliance is the signer's subsequent testimony as to his subjective state of mind when signing the card, such showing is insufficient. to invalidate the card.

Based upon the foregoing, even if convincing evidence existed that Gibbons' card was solicited on a representation that all others had signed, it would, in the circumstances presented here, be counted as a valid designation of the Union. Respondent's challenge to the card of Gibbons is therefore found lacking in merit and his card shall be counted towards the Union's majority in this case.

Respondent also contests the cards of Jean Kerns and Marion Welker. It is claimed that both were executed upon representations that initiation fees would be $5 if they signed before, but $50 if they waited until after the Union were recognized. See e.g. *N.L.R.B.* v. *Savair Manufacturing Co.*, 414 U.S. 270 (1973). The testimony of Kerns and Welker that any misrepresentations were made prior to completion of their designations is discredited. Kerns impressed me as laboring under a bias, which was confirmed by her testimony that she neither read nor understood the implications of signing. Her attempt to repudiate her card struck the undersigned as based upon contrived testimony.[22]

With respect to Welker, her signature was solicited by Kerns. She claims that Kerns told her that "if you sign it now, it would cost you $5, . . . if the Union got in and if you didn't sign it and the Union got in, it would cost you $50." As indicated, Welker's card was dated November 10. As in the case of Kerns, I find that substantial credible evidence does not exist substantiating that such a representation was made prior to her execution thereof. Welker's lack of capacity for recollection was obvious. Indeed she testified that it was possible that the statement concerning initiation fees might have been made after she signed her card. If

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22. Kerns' card was improperly dated October 28. In finding that it was executed prior to November 11, it is noted that she testified that she was asked to sign a card by Leid "probably around the first week in November, I imagine." While unwilling to credit testimony of Leid that she obtained the completed card from Kerns on November 3, an inference that the Kerns' card was executed in advance of the critical date is supported by testimony of Welker. Thus, Welker signed on November 10, and as her card was solicited by Kerns, it is fair to assume that Kerns had already done so.

such a representation was made, and I doubt that it was, her testimony was too uncertain to establish grounds for voiding an otherwise valid designation.

Based on the foregoing, I find that, as of November 11, the Union possessed 17 valid designations from unit employees. The parties stipulated that as of that date, the unit consisted of at least 27 employees. The status of 3 others was disputed: discriminatee Andrea Winters, shift manager Gregory Hevell,[23] and Kenneth McDowell. For reasons heretofore stated, Winters has been excluded and Hevell included. With respect to McDowell, whom the General Counsel would exclude, and Respondent include, it is my view that the record is inconclusive as to his status. In any event, the issue need not be resolved. For assuming that he was properly includable, the Union as of November 11, had been designated by 17 employees in a unit of 29.[24]

D. Conclusions as to the Refusal to Bargain

In my opinion, the unfair labor practices found herein are subject to remedy in conventional fashion under conditions adequate to facilitate an atmosphere in which a fair election could be conducted. Respondent's unlawful conduct except for those entailed in the restoration of strikers ended prior to the Union's first formal demand for recognition on November 3. Certain violations including interrogation, instructing an employee to engage in surveillance, and promising a benefit to Zahuranec, all involved unfair labor practices with respect to an employee who

23. Felix was assisted by Shift Supervisor Greg Hevell. The complaint alleged that Hevell was a supervisor and agent of the Respondent. In his post-hearing brief, however, the General Counsel "acknowledges that Hevell is includable in the unit as a nonsupervisory employee. . . ." Previously, the Regional Director for Region 6 of the National Labor Relations Board issued a Decision and Direction of Election on January 29, 1980, in which Hevell was excluded from the unit as a statutory supervisor. In the instant proceeding, though issue was joined via the pleadings in this regard, no effort was made to litigate the status of Hevell. In the circumstances, but with some reluctance, I shall accept the General Counsel's post-hearing concession.

24. Appendix C attached hereto lists employees whose cards, though contested by Respondent, have been counted as valid designations.

initially had volunteered to Respondent information concerning the union activity of co-workers. Evidence that, in other respects, any representative of management sought to or actually participated in any conversation, coercive or otherwise, with an employee concerning the Union during the course of the campaign is limited to a brief exchange between Felix and Shift Supervisor Hevell. It is true that other unfair labor practices in the form of the upgrading of 5 employees to supervisory positions, and the grant of increases to this group, involved serious unfair labor practices. With respect thereto, conventional remedies under the National Labor Relations Act are ineffective to restore the *status quo ante*. Nonetheless, those benefits were extended to only five of some 29 employees, and occurred a month before the Union filed its representation petition. Indeed, insofar as the credible evidence on this record reveals, Respondent's unlawful conduct was manifested towards only 6 employees, with no unlawful threats of reprisal or discrimination involved.[25]

The Board has acknowledged that not all "serious unfair labor practices . . . are sufficiently egregious to warrant a bargaining order."[26] Although the line between patterns of misconduct which meet the test of pervasiveness is seldom free from doubt, having considered the total circumstances in this case, on balance, I am not convinced that the unfair labor practices herein were of a degree sufficient to prevent the holding of a free and fair election in the future, and, accordingly, I shall dismiss the 8 (a) (5) and (1) allegations in the complaint.

E. General Remedial Provisions

Having found that Respondent has engaged in certain unfair labor practices, it shall be recommended that Respondent be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the purposes and policies of the Act.

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25. See e.g. *C & E Stores, Inc., C & E SuperValue Division*, 221 NLRB 1321, 1327.

26. *California Pellet Mill Company*, 219 NLRB 435, 439.

Having found that Respondent violated Section 8 (a) (3) and (1) of the Act by failing to provide unfair labor practice strikers Leid, Maines, and Zahuranec overtime they enjoyed prior to the strike, Respondent shall be ordered to restore such privileges immediately, and to make whole said discriminatees for earnings lost by virtue thereof, with backpay to be computed on a quarterly basis pursuant to *F.W. Woolworth Company*, 90 NLRB 289 (1950), with interest as prescribed in *Florida Steel Corporation*, 231 NLRB 651. [27]

Conclusions of Law

1. The Respondent is an employer engaged in commerce within the meaning of Section 2 (6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2 (5) of the Act.

3. Respondent independently violated Section 8 (a) (1) of the Act by coercively interrogating an employee concerning the union activity of co-workers; by instructing an employee to report on the union activity of co-workers; and by promising wage increases, granting wage increases, and promoting employees, to discourage their support of the Union.

4. Respondent violated Section 8 (a) (3) and (1) of the Act by denying unfair labor practice strikers Delores A. Maines, Julio C. Leid and Eugene S. Zahuranec, overtime benefits they enjoyed prior to the strike.

5. Except as heretofore found, Respondent has not engaged in any other unfair labor practices within the meaning of the Act.

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27. See generally *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

Upon the foregoing findings of fact, conclusions of law, upon the entire record in this case, and pursuant to Section 10 (c) of the Act, I hereby issue the following recommended:[28]

ORDER

Respondent United Oil Manufacturing Co., Inc., Kylertow.., Pennsylvania, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Coercively interrogating employees concerning union activity, instructing employees to engage in surveillance and to report on the union activity of co-workers and promising wage increases, granting wage increases, or reclassifying or promoting employees to discourage them from supporting a union.

(b) Discouraging membership in a labor organization by denying overtime benefits, or otherwise discriminating against employees with respect to their wages, hours or tenure of employment because they have engaged in activity protected by the Act.

(c) In any like or related manner interfering with, coercing, or restraining employees with respect to rights guaranteed in Section 7 of the Act.

2. Take the following affirmative action, deemed necessary to effectuate the policies of the Act.

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28. In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

(a) Restore overtime benefits enjoyed by Julio Leid, Eugene Zahuranec and Delores Maines prior to the strike, and make them whole for the discriminatory denial thereof following their reinstatement in the manner set forth in the section of this decision entitled "The Remedy".

(b) Post at its place of business in Kylertown, Pennsylvania, copies of the attached notice marked "Appendix A".[29] Copies of said notice on forms provided by the Regional Director for Region 6, shall after being signed by Respondent's authorized representative, be posted by Respondent immediately upon receipt thereof and be maintained by it for 60 consecutive days thereafter in conspiscuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken to insure that said notices are not altered, defaced or covered by any other material.

(c) Notify the Regional Director for Region 6 in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

Dated, Washington, D.C. September 5, 1980

Joel A. Harmatz
Administrative Law Judge

29. In the event that the Board's Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

APPENDIX A JD-529-80

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD

AN AGENCY OF THE UNITED STATES GOVERNMENT

AFTER A TRIAL IN WHICH ALL PARTIES WERE REPRESENTED BY THEIR ATTORNEYS AND AFFORDED THE OPPORTUNITY TO PRESENT EVIDENCE IN SUPPORT OF THEIR RESPECTIVE POSITIONS, IT HAS BEEN FOUND THAT WE HAVE VIOLATED THE NATIONAL LABOR RELATIONS ACT IN CERTAIN RESPECTS AND WE HAVE BEEN ORDERED TO POST THIS NOTICE AND TO CARRY OUT ITS TERMS.

The National Labor Relations Act, gives you, as employees, certain rights:

To engage in self-organization;
To form, join, or help a union;
To bargain collectively through a representative of your own choosing;
To act together for collective bargaining or other mutual aid or protection; and
To refrain from any or all of these things.

Accordingly, we give you these assurances.

WE WILL NOT interrogate you concerning union activity or tell you to spy on co-workers and to report on their union activity, and WE WILL NOT promise you benefits, grant you benefits, or promote you, in order to discourage you from engaging in activity on behalf of AMALGAMATED FOOD EMPLOYEES UNION LOCAL 590 a/w UNITED FOOD AND COMMERCIAL WORKERS' INTERNATIONAL UNION, AFL-CIO, or any other labor organization.

WE WILL NOT discourage membership in the aforesaid Union, or any other labor organization by denying employment benefits to you because you have engaged in activity on behalf of a union.

WE WILL NOT in any like or related manner interfere with, restrain or coerce you in the exercise of the rights set forth at the top of this notice.

WE WILL restore overtime benefits enjoyed prior to the strike by JULIO LEID, DELORES MAINES and EUGENE ZAHURANEC, and we shall make them whole for losses they sustained because we denied such overtime after the strike, with interest.

UNITED OIL MANUFACTURING CO., INC.
(Employer)

Dated _____ By _____ _____
(Representative) (Title)

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Porter Building - 10th Floor, 601 Grant Street, Pittsburgh, Pennsylvania 15219 - Telephone No. (412) 644-2969.

APPENDIX B

Name	Date Signed
1. Joyce Hockenberry	10/28/79
2. Julio C. Leid	10/28/79
3. Robert J. Pearce	10/28/79
4. Eugene Steve Zahuranec	10/28/79
5. Sharon A. Shimmel	10/28/79
6. Don C. Murray, Jr.	11/02/79
7. Richard P. Michaels	11/01/79
8. Mark Anthony Bezilla	11/01/79
9. Anthony Fenush	11/02/79
10. Steve Pelton	11/10/79
11. Catherine L. Sedlak	11/02/79
12. Doug Turner	10/28/79
13. Lester Zimmerman	10/28/79

APPENDIX C

Name	Date Signed
1. Delores Maines	11/05/79
2. Charles Gibbons	11/03/79
3. Jean Kerns	11/ /79
4. Marian Welker	11/10/79

Office - Supreme Court, U.S.
FILED
OCT 29 [illegible]
ALEXANDER L. STEVAS,
CLERK

No. 82-344

In the Supreme Court of the United States

OCTOBER TERM, 1982

UNITED OIL MANUFACTURING CO., INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTION PRESENTED

Whether, in the circumstances of this case, the National Labor Relations Board reasonably concluded that petitioner's unfair labor practices rendered a fair election unlikely and that a bargaining order was therefore an appropriate remedy.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A26) is reported at 672 F. 2d 1208. The decision and order of the National Labor Relations Board (Pet. Supp. App. A30-A37) are reported at 254 N.L.R.B. 1320.

JURISDICTION

The judgment of the court of appeals (Pet. App. A27) was entered on April 19, 1982. A petition for rehearing (Pet. App. A28-A29) was denied on May 17, 1982. The petition for a writ of certiorari was filed on August 13, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

The relevant portions of the National Labor Relations Act, as amended (29 U.S.C. 151 *et seq.*), are set forth at Pet. 4.

STATEMENT

1. Petitioner is engaged in the operation of a gasoline and diesel fuel station, store, and motel located at a truck stop in Kylertown, Pennsylvania. In late October 1979, the Union[1] commenced an organizational campaign among the employees at these facilities (Pet. Supp. App. A41). By November 11, a majority of the employees had signed authorization cards designating the Union as their collective bargaining representative (Pet. Supp. App. A33). Petitioner refused to bargain with the Union. On November 12, the employees went on strike, and the strike continued until March 10, 1980, when an unconditional offer to return to work was made on behalf of the strikers (Pet. Supp. App. A42).

The Board found that petitioner had violated Section 8(a)(1) of the National Labor Relations Act, 29 U.S.C. 158(a)(1), prior to the strike by coercively interrogating an employee concerning the union activity of other employees, by instructing him to report on the union activity of other employees, and by granting wage increases and promotions to six of the 29 unit employees for the purpose of discouraging union activity (Pet. Supp. App. A31-A32). The Board further found that petitioner had violated Section 8(a)(1) and (3) of the Act, 29 U.S.C. 158(a)(1) and (3), after the strike ended by denying overtime work and pay to certain returning strikers and thereby failing to grant proper reinstatement (Pet. Supp. App. A32). Finally, the Board found that these unfair labor practices had made a fair election unlikely, if not impossible (Pet. Supp. App. A32). Accordingly, the Board found that petitioner had violated Section 8(a)(1) and (5) of the Act, 29 U.S.C. 158(a)(1) and (5), by refusing to bargain with the Union, which had obtained

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[1]Amalgamated Food Employees Union Local 590, affiliated with United Food and Commercial Workers International Union, AFL-CIO (Pet. Supp. App. A33).

authorization cards from a majority of the employees in a appropriate unit (Pet. Supp. App. A33). The Board ordered petitioner, inter alia, to bargain with the Union upon request (Pet. Supp. App. A34-A35).

2. The court of appeals sustained the Board's findings and enforced its order (Pet. App. A1-A26). The court noted that the unfair labor practices affected a substantial percentage of the employees directly and were communicated to other employees as well; that those practices were committed by the most senior official at the truck stop; that they conveyed to the employees the message, which could not easily be erased, that petitioner had the economic means to achieve the result it desired by either rewarding or punishing employees; and that the post-strike violations had reinforced the effects of the pre-strike violations. The court held that, in these circumstances, the Board had not exceeded its broad remedial authority, recognized in *NLRB* v. *Gissel Packing Co.*, 395 U.S. 575 (1969), in concluding that petitioner's unfair labor practices made a fair election unlikely and that a bargaining order was therefore warranted (Pet. App. A8-A12; see also Pet. App. A14-A15 (concurring opinion)).[2] A petition for rehearing in banc was denied (Pet. App. A28-A29).

ARGUMENT

1. In *NLRB* v. *Gissel Packing Co.*, 395 U.S. 575, 613-614 (1969), this Court held that the Board has authority to issue a bargaining order, not only in "exceptional" cases marked by "outrageous" and "pervasive" unfair labor practices, but also in "less extraordinary cases marked by less pervasive practices which nonetheless still have the tendency to undermine majority strength and impede the election processes." This Court further pointed out (*id.* at 612

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[2]Senior Circuit Judge Van Dusen disagreed that a bargaining order was appropriate here (Pet. App. A16-A26).

n.32) that "[i]n fashioning its remedies under the broad provisions of § 10(c) of the Act (29 U.S.C. 160(c)), the Board draws on a fund of knowledge and expertise all its own, and its choice of remedy must therefore be given special respect by reviewing courts." Petitioner concedes (Pet. 6) that "the propriety of a bargaining order is a factual conclusion in every case," but it challenges the factual conclusion of the Board, which was affirmed by the court of appeals, that a bargaining order was necessary to remedy the unfair labor practices in this case. Thus, this case presents only a factual issue that does not merit further review by this Court. *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 491 (1951).[3]

In any event, the Board's finding that a fair election was unlikely here is clearly justified in light of the small size of the bargaining unit; the extensive pre-strike unfair labor practices, which directly affected a substantial percentage of the unit employees and were communicated to all others; and the additional unfair labor practices committed after the strike ended. Moreover, petitioner's unlawful conduct was aimed at some of the leading union adherents and included a combination of unlawful wage increases and discrimination against union supporters—measures which demonstrated that petitioner would use either the carrot or the stick to defeat the Union.

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[3]Petitioner relies (Pet. 9-10) on the fact that the administrative law judge reached a conclusion contrary to that of the Board with respect to the necessity of a bargaining order. However, as this Court noted in *Universal Camera, supra*, 340 U.S. at 496, the significance of an administrative law judge's decision contrary to that of the Board "depends largely on the importance of credibility in the particular case." Here, the Board did not reverse any of the law judge's credibility findings, but merely drew a different legal conclusion from the established facts. Accordingly, the court below properly gave little weight to the law judge's conclusion (Pet. App. A12 n.4, A15 n.1). See *Oil Workers International Local 4-243* v. *NLRB*, 362 F. 2d 943, 946 (D.C. Cir. 1966).

2. Petitioner argues (Pet. 8-13) that the decision of the court of appeals is contrary to that court's earlier decision in *NLRB* v. *K & K Gourmet Meats, Inc.*, 640 F. 2d 460 (3rd Cir. 1981). Even if it were true that the decision below created an intra-circuit conflict, that would not warrant review by this Court. *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957). Moreover, the facts in *K & K Gourmet Meats, Inc.* are clearly distinguishable from those here.

In *K & K Gourmet Meats, Inc.*, the only unfair labor practices were promises of benefits, and an unkept promise is unlikely to influence employee behavior in a way desired by management. The instant case, on the other hand, involves a *grant* of benefits. As the Court noted in *NLRB* v. *Exchange Parts Co.*, 375 U.S. 405, 409 (1964), such conduct carries with it "the suggestion of a fist inside the velvet glove" and "the inference that the source of benefits now conferred is also the source from which future benefits must flow and which may dry up if it is not obliged." Moreover, as the Board has explained, its traditional remedies do not include rescission of an unlawfully granted wage increase. Consequently, such remedies cannot be employed to eliminate the impact of the wage increase on employee free choice and thus make a fair election possible. *Skaggs Drug Centers, Inc.*, 197 N.L.R.B. 1240, 1241 (1972).

Finally, in *K & K Gourmet Meats, Inc.*, no additional unfair labor practices were committed after the employees went on strike. The court in that case viewed the strike as evidence that the employees did not believe the promises of benefits, and nothing happened thereafter to cause the employees to take the promises more seriously. 640 F. 2d at 470. In the instant case, petitioner continued its unlawful conduct after the strike ended by discriminating against three employees, all of whom had previously been granted or promised wage increases and one of whom was the

known leader of the Union's campaign.[4] The Board properly viewed this post-strike conduct as exacerbating the coercive effect of the unlawful wage increases, since it made explicit the presence of the "fist inside the velvet glove" suggested by the wage increases.[5]

3. The cases from other circuits upon which petitioner relies (Pet. 13-14) are also clearly distinguishable. In *NLRB* v. *Chatfield-Anderson Co.*, 606 F. 2d 266, 269 (9th Cir. 1979), most of the unlawful conduct was expressly disavowed by the company president, and the court viewed the remaining violations as "almost trivial." Similarly, in *Peerless of America, Inc.* v. *NLRB*, 484 F. 2d 1108, 1120-1121 (7th Cir. 1973), the court relied on the marginal nature of the violations, as well as the company president's statement that any unlawful conduct was against his express instructions and would not recur. In *NLRB* v. *Pilgrim Foods, Inc.*, 591 F. 2d 110, 120 (1st Cir. 1978), the violations ceased when higher management was informed of them, and the supervisor who committed the violations left the company's employ, thereby diminishing the continuing impact of his conduct.

Finally, in *NLRB* v. *Pace Oldsmobile, Inc.*, 681 F. 2d 99, 101-102 (2d Cir. 1982), the court did not hold that a bargaining order was inappropriate, but found that the Board had not sufficiently explained the need for such an order and

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[4]Petitioner's characterization of this discrimination as "a virtually inadvertent technical violation" (Pet. 12) merely takes issue with the Board's contrary finding (Pet. Supp. App. A32), which was affirmed by the court of appeals (Pet. App. A11, A14-A15).

[5]To the extent that *K & K Gourmet Meats, Inc.* held that the Board cannot consider pre-strike, as well as post-strike, conduct in assessing the need for a bargaining order, it was overruled by the Third Circuit's subsequent en banc decision in *NLRB* v. *Permanent Label Corp.*, 657 F. 2d 512, 519 (1981).

remanded the case for further consideration. In the instant case, the unfair labor practices were committed by the highest official at petitioner's truck stop, and petitioner not only did not disavow the violations, but committed additional unfair labor practices after the strike. Moreover, the Board explicitly set forth (Pet. Supp. App. A32) its reasons for issuing a bargaining order.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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National Labor Relations Board

OCTOBER 1982

DOJ-1982-10